ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

NO. 05-1095
(AND CONSOLIDATED CASES)

COVAD COMMUNICATIONS COMPANY, *ET AL.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

BOC	Bell operating company
CLEC	competitive local exchange carrier
DS1	Digital Service, level 1; a type of high-capacity loop or transport trunk that is capable of carrying 24 voice calls
DS3	Digital Service, level 3; a type of high-capacity loop or transport trunk that is the equivalent of 28 DS1 facilities (and is therefore capable of carrying 672 voice calls)
EEL	enhanced extended link
ILEC	incumbent local exchange carrier
MSA	Metropolitan Statistical Area
NASUCA	National Association of State Utility Consumer Advocates
NJDRA	New Jersey Division of Ratepayer Advocate
TELRIC	total element long-run incremental cost
UNE	unbundled network element
UNE-P	the UNE platform; a combination of loop, transport, and switching elements that enables CLECs to provide telecommunications services exclusively through the use of UNEs
USTA I	*United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003)
USTA II	*United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313 (2004)

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

A 1996 amendment to the Communications Act requires incumbent local telephone companies to "unbundle" parts of their networks and to lease those facilities to prospective competitors in certain circumstances. In response to a remand from this Court, the Federal Communications Commission recently revised its rules for implementing the statute's network unbundling provisions. *Unbundled Access to Network Elements*, 20 FCC Rcd 2533 (2005) (JA) ("*Order*"). Petitioners' various challenges to the Commission's new rules present the following issues for review:

(1) whether the FCC reasonably decided to eliminate mandatory unbundling of mass market switching;

(2) whether the Commission established reasonable transitional rates for mass market switching while mandatory unbundling is being phased out;

(3) whether the Commission reasonably concluded that a competitor's use of an incumbent's tariffed special access service to provide local telephone service does not in itself warrant elimination of network unbundling requirements in the local exchange market;

(4) whether the Commission established reasonable tests for identifying areas where competitors are impaired without unbundled access to incumbents' high-capacity loop and transport facilities; and

(5) whether the claims asserted by the New Jersey Division of Ratepayer Advocate ("NJDRA") concerning preemption and the constitutionality of forbearance are properly before the Court.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to the briefs for petitioners.

COUNTERSTATEMENT

A. The Telecommunications Act Of 1996

For most of the last century, American consumers could purchase local telephone service from only one source: the incumbent local exchange carrier ("ILEC") that served the area where they lived. Until the 1990s, regulators treated local phone service as if it were a natural monopoly. States typically granted an exclusive franchise in each local service area to the ILEC that owned and operated the local telephone network. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999).

Congress fundamentally altered this regulatory framework by enacting the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56. Rejecting the assumption that local exchange service is a natural monopoly, the 1996 Act seeks to open local exchange markets to competition by imposing upon ILECs “a host of duties.” *AT&T*, 525 U.S. at 371. Foremost among these duties is “the [ILEC’s] obligation under 47 U.S.C. § 251(c) … to share its network with competitors.” *Ibid.*

Pursuant to 47 U.S.C. § 251(c)(3), ILECs must provide requesting competitive local exchange carriers (“CLECs”) with access to unbundled network elements (“UNEs”) “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.” Section 252 provides that the rate for UNE access shall be “based on the cost” of providing the UNE. 47 U.S.C. § 252(d)(1)(A)(i).[1]

The 1996 Act defines a “network element” as “a facility or equipment used in the provision of a telecommunications service.” 47 U.S.C. § 153(29). This case involves three types of network elements: “switches (equipment directing calls to their destinations),” “local loops (wires connecting telephones to switches),” and “transport trunks (wires carrying calls between switches).” *See AT&T*, 525 U.S. at 371.

Congress directed the FCC to determine which network elements ILECs must make available to their competitors on an unbundled basis. 47 U.S.C. § 251(d)(2). When making such determinations for nonproprietary elements, “the Commission shall consider, at a minimum, whether … the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.” 47 U.S.C. § 251(d)(2)(B) (emphasis added).

[1] To establish cost-based UNE rates, the FCC adopted a forward-looking cost methodology known as “TELRIC” (short for “total element long-run incremental cost”). The Supreme Court upheld the TELRIC methodology as lawful and consistent with the statute. *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

B. Initial FCC Efforts To Implement Network Unbundling

Originally, the FCC construed section 251(d)(2)(B) to mean that "*any* increase in cost (or decrease in quality) imposed by denial of a network element" would "impair" a competing carrier. *AT&T*, 525 U.S. at 389. Because this reading of the statute effectively imposed no limits on CLECs' access to ILECs' network facilities, the Supreme Court struck down the agency's interpretation as unreasonable. *Id.* at 387-92. It held that "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act," when defining the scope of ILECs' unbundling obligations. *Id.* at 388.

In response to the Supreme Court's remand, the agency modified its statutory interpretation, finding impairment only when lack of access to a network element "materially diminishes a requesting carrier's ability to provide the services it seeks to offer." 47 C.F.R. § 51.317(b)(1) (2000). On review, this Court remanded the Commission's UNE rules for further consideration. *United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003). It concluded that the Commission had acted unreasonably in adopting "a uniform national rule, mandating … unbundling [of a particular element] in every geographic market and customer class, without regard to the state of competitive impairment [with respect to that element] in any particular market." *Id.* at 422. The Court read the statute to require "a more nuanced concept of impairment than is reflected in findings … detached from any specific markets or market categories." *Id.* at 426. In addition, the Court faulted the Commission for finding widespread impairment on the basis of "cost disparities" that are "faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector." *Ibid.* The Court reasoned that the Commission, by tracing impairment to "universal" cost disparities, had not adequately weighed the costs of network unbundling, including "the disincentive to invest in innovation" and the "complex issues" associated with "managing shared facilities." *Id.* at 427. To strike a more appropriate "balance" between the costs and benefits of unbundling, the Court said, the Commission's impairment analysis should focus on cost disparities that are "linked (in some degree) to natural monopoly" and market "characteristics that would make genuinely competitive provision of an element's function wasteful." *Ibid.*

C. The *Triennial Review Order*

In 2003, after conducting a triennial review of its UNE rules, the FCC issued an order that sought to address the *USTA I* remand. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *aff'd in part, rev'd in part, and remanded in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004). The Commission amended its UNE rules to mandate a "granular" analysis that accounts for "'market-specific variations in competitive impairment'" by considering distinctions in "customer class, geography, and service." *Id.* ¶ 118 (quoting *USTA I,* 290 F.3d at 422). The agency further refined its impairment inquiry by asking whether lack of access to a particular network element would likely make market entry "uneconomic." *Id.* ¶ 84. The Commission explained that it would find impairment only if certain costs that posed recognized barriers to competitive entry (*e.g.*, sunk costs, large absolute cost advantages, and first-mover advantages) exceeded "*all* the revenue opportunities that a competitor can reasonably expect to gain … from providing all possible services that an entrant could reasonably expect to sell." *Id.* ¶¶ 85-90, 100.

Applying this new impairment standard, the FCC eliminated a number of elements from its list. In particular, it declined to require unbundling of the broadband capabilities of fiber loops. *See Triennial Review Order* ¶¶ 272-297. The Commission also ended mandatory unbundling of local circuit switches serving "enterprise" customers (*i.e.*, larger businesses). *Id.* ¶¶ 451-458.

The Commission continued to require nationwide unbundling of local circuit switches serving the "mass market" (residential subscribers and small businesses). *Triennial Review Order* ¶¶ 459-461. It found that CLECs would be impaired without unbundled mass market switching because the "hot cut" process – the ILECs' procedure for disconnecting mass market customers' lines from ILEC switches and reconnecting them to CLEC switches – posed operational and economic barriers to the use of non-ILEC switches. *Id.* ¶¶ 464-475. At the same time, the Commission acknowledged the possibility that there might be no impairment in certain markets where an ILEC's hot cut performance is (or becomes) satisfactory. Lacking sufficient evidence to identify any such markets, the FCC authorized state commissions to perform market-by-market analyses, applying FCC-specified criteria, to identify any specific markets where CLECs were *not* impaired without access to unbundled mass market switching, and to remove the unbundling requirement in such markets. *Id.* ¶¶ 493-527.

The Commission adopted a similar approach with respect to loop and transport facilities at the DS1 and DS3 capacity levels. A DS1 facility can accommodate up to 24 voice-grade circuits, while a DS3 facility can support as many as 672 such circuits (the equivalent of 28 DS1 facilities). *Triennial Review Order* at n.1154. The FCC made a nationwide finding of impairment vis-à-vis these high-capacity facilities; but it also enlisted state commissions to use FCC-defined criteria to identify specific locations or routes where lack of access to DS1 or DS3 loops or transport trunks would not impair competitors and to remove the unbundling requirement in those areas. *Id.* ¶¶ 320-340, 386-418.

D. The *USTA II* Decision

This Court affirmed important aspects of the *Triennial Review Order,* including the FCC's decision to terminate mandatory unbundling of broadband loop capabilities and enterprise switches. *See USTA II,* 359 F.3d at 577-90, 592-93. But the Court also vacated substantial portions of the order. First, it ruled that the FCC lacked authority to delegate impairment determinations to state commissions. *Id.* at 565-68. Then the Court vacated the Commission's "undifferentiated nationwide impairment" findings concerning mass market switching and high-capacity transport. *Id.* at 568-71, 573-74. It held that the Commission could not order nationwide unbundling of those facilities without "exploring the possibility of more nuanced alternatives" in light of record evidence "that markets vary decisively (by reference to [the FCC's] impairment criteria)." *Id.* at 570.

In addition, the Court vacated the Commission's finding that wireless carriers were impaired without access to ILECs' dedicated transport. *USTA II,* 359 F.3d at 575-77. Before UNEs became available under the 1996 Act, wireless firms had obtained access to ILEC networks by purchasing tariffed special access services. Special access offers competing carriers (as well as end users) dedicated use of all or part of an ILEC's point-to-point facilities at a specific capacity level, typically at higher prices than comparable UNEs. Noting that the availability of special access had allowed wireless "competition not only to survive but to flourish," the Court found it "hard to see any need for the Commission to impose the costs of mandatory unbundling" in the wireless market. *Id.* at 576. Similarly, the Court observed that "robust competition" in the long-distance market by carriers using special access "belies any suggestion that the lack of unbundling makes entry uneconomic." *Id.* at 592.

The Court rejected the Commission's contention that CLECs' use of ILECs' tariffed services was irrelevant to assessing impairment. *USTA II*, 359 F.3d at 576-77. It held that the Commission "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired." *Id.* at 577. But the Court did not suggest that the Commission would have to preclude unbundling in every market where ILECs offered special access. Instead, the Court said that the Commission would be "free to take into account such factors as administrability, risk of ILEC abuse, and the like" when it "consider[s]" the impact of the availability of special access on impairment in particular markets. *Ibid.*

In *USTA II*, the ILECs also challenged the Commission's decision to allow CLECs to convert existing special access services to UNEs in markets where unbundling is required. In addressing that claim, the Court stated that "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access … precludes a finding that the CLECs are 'impaired' by lack of access" to UNEs under section 251(c)(3). *USTA II*, 359 F.3d at 593. The Court did not discuss, however, whether conversions of special access services to UNEs would be permissible in markets where competition was less than "robust." Nor did it vacate the Commission's rule permitting conversions where other criteria for UNE access are met. *See* 47 C.F.R. § 51.316. The Court also recognized that in markets where new entrants could obtain UNEs, a bar on conversions might "create anomalies" by precluding current users of special access from purchasing UNEs while placing no restrictions on UNE access for other CLECs. *USTA II*, 359 F.3d at 593. The Court said that the Commission could "consider and resolve any potential anomaly" concerning conversions on remand. *Ibid.*

E. The Order On Review

In August 2004, the FCC issued a notice of proposed rulemaking seeking comment on how it should revise its unbundling rules to respond to the *USTA II* remand. *Unbundled Access to Network Elements*, 19 FCC Rcd 16783, 16788-91 (¶¶ 8-15) (2004) (JA , -) ("*Interim Order*"). After receiving and reviewing extensive comments from ILECs, CLECs, and other interested parties, the Commission in February 2005 released the *Order* that is the subject of this litigation.[2]

In the *Order*, the FCC decided to end mandatory unbundling of mass market switching, subject to a transitional pricing mechanism. *Order* ¶¶ 199-228 (JA -).[3] The Commission also concluded that the use by some competitors of special access to provide local exchange service or exchange access did not in itself justify the elimination of unbundling in local markets or a ban on conversions of special access services to UNEs. *Order* ¶¶ 46-65, 229-232 (JA - , -). In addition, the Commission developed new tests for determining whether CLECs are impaired in particular markets without access to unbundled DS1 or DS3 loops or transport trunks. *Order* ¶¶ 66-198 (JA -). It made clear that, consistent with the carriers' interconnection agreements, state commissions will generally resolve factual disputes regarding

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[2] In its *Interim Order*, the Commission directed ILECs, during the period between the request for comment and the expedited promulgation of new rules, to comply with interim unbundling requirements that were designed to avert market disruption. *Interim Order* ¶¶ 18-28 (JA -). The ILECs filed a petition for review and a mandamus petition challenging the interim requirements. The Pennsylvania Public Utility Commission also petitioned for review of the *Interim Order*. This Court dismissed all of these petitions as moot after the Commission's final unbundling rules took effect in March 2005, superseding the interim requirements.

[3] In this brief, the phrase "mass market switching" refers only to local circuit switches, not to newer technologies such as packet switching. *See United States Telecom Ass'n v. FCC*, 227 F.3d 450, 464 (D.C. Cir. 2000) (describing the difference between "conventional circuit-mode telecommunications" and "digital packet-switched networks").

application of these tests. *Order* ¶ 234 (JA -). Each of these agency actions is challenged here.

(1) Mass Market Switching

The Commission had based its previous impairment finding for mass market switching "solely on operational and economic impairment arising from the hot cut process." *Order* ¶ 210 (JA) (citing *Triennial Review Order* ¶ 476). On remand, the Commission found substantial evidence that "new, improved hot cut procedures" adopted by the Bell operating companies ("BOCs") had largely eliminated such impairment. *Ibid.* The record indicated that the BOCs' newly developed "batch" hot cut processes could more efficiently handle large hot cut volumes, sharply reducing the risk of service disruptions and delays. *Order* ¶¶ 211-212 (JA -). This evidence corroborated the Commission's earlier findings under 47 U.S.C. § 271 that the BOCs could adapt their hot cut capabilities to meet changes in demand. *Order* ¶ 214 (JA). The Commission also found that the charges CLECs pay for hot cuts have substantially declined. *Order* ¶ 213 (JA). Moreover, because many CLECs are adopting alternative entry strategies that do not rely on hot cuts, the Commission determined that any "barriers associated with hot cuts are of diminishing significance to competition in the mass market." *Order* ¶ 215 (JA). In view of all these factors, the Commission found "no impairment arising from the hot cut process for the majority of mass market lines." *Order* ¶ 210 (JA).

The Commission also considered and rejected arguments that other types of costs and operational issues would impair CLECs without access to unbundled ILEC switches. *Order* ¶¶ 222-225 (JA -). The Commission found that "the record demonstrates significant nationwide deployment of switches by competitive providers." *Order* ¶ 205 (JA). The record further revealed that CLECs are deploying "newer, more efficient switching technologies," including "softswitch technology and packet switches," which "are less expensive than traditional circuit switches." *Order* ¶ 206 (JA).

Finding "no significant variation in switch deployment throughout the country," the agency adopted "a national approach" to assessing impairment for mass market switching. *Order* ¶ 205 (JA). Given the documented proliferation of non-ILEC switches, the Commission determined that CLECs "are not impaired in the deployment of competitive switches." *Order* ¶ 206 (JA). The Commission also found that CLECs "are able to use switches, once deployed, to serve the mass market." *Ibid.* It cited evidence that CLECs are using competitive switches to serve mass market customers in a large majority of the nation's major metropolitan areas. *Order* ¶ 208 (JA). "In light of this evidence of successful entry" with non-ILEC switches, the FCC concluded "as a general matter" that eliminating unbundled access to ILEC switches will not impair mass market competition. *Order* ¶ 209 (JA).

In any event, the Commission said that it would decline to require unbundling of mass market switching "even if some limited impairment might exist in some markets." *Order* ¶ 218 (JA). Invoking its authority under section 251(d)(2) to consider factors other than impairment, the agency explained that continued unbundling of switches "would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition" – the sort of competition that the 1996 Act seeks to encourage. *Order* ¶¶ 218-219 (JA -). Previously, the FCC had required ILECs to lease access to the so-called "UNE platform" or "UNE-P" – a combination of unbundled ILEC switches, loops, and transport that allowed CLECs to provide basic local phone service entirely via UNEs. The record showed that the availability of UNE-P at TELRIC rates had "discouraged" CLECs "from innovating and investing in new facilities." *Order* ¶ 220 (JA). Balancing this significant disincentive to infrastructure investment against "the limited number of cases in which requesting carriers may be impaired without access to unbundled switching," the Commission concluded that "the costs associated with unbundling" mass market switching "outweigh any benefits." *Ibid.* (JA). In reaching this conclusion, the Commission stated that it was following this Court's "admonition to promote deployment of competitors' facilities." *Order* ¶ 221 (JA).

Having decided to discontinue unbundling of mass market switching, the Commission established a transition plan for phasing out existing unbundling arrangements. Under the plan, CLECs have 12 months from the *Order*'s effective date (March 11, 2005) to make alternative service arrangements for customers that currently receive service through unbundled switches. *Order* ¶ 227 (JA). The Commission declared that during the 12-month transition period, rates for unbundled switching would be set one dollar higher than the highest state-prescribed rate for UNE-P that had been in effect between June 15, 2004, and the *Order*'s effective date. *Order* ¶ 228 (JA). The Commission reasoned that this "moderate" price increase would "help ensure an orderly transition by mitigating the rate shock that could be suffered by [CLECs] if TELRIC pricing were immediately eliminated" for mass market switching. *Ibid.* (JA -). At the same time, the Commission found that the rate increases and "the limited duration of the transition" would help protect "the interests of [ILECs]" in securing prompt relief from unbundling obligations. *Ibid.* (JA).

(2) Special Access

In response to the *USTA II* remand, the Commission considered how the availability of special access should affect the assessment of impairment in particular markets. On the basis of that analysis, the FCC denied access to UNEs for the exclusive provision of mobile wireless and long-distance services. *Order* ¶¶ 34-37 (JA -). Like the Court, the Commission found that "competition has evolved without access to UNEs" in the wireless and long-distance markets. *Order* ¶ 36 (JA). The Commission on numerous occasions had found the mobile wireless and long-distance markets to be competitive, *see Order* at nn.106-107 (JA -), and the *USTA II* Court had concurred in those conclusions, *see USTA II*, 359 F.3d at 576, 592. For those two markets, where competitors have used special access arrangements to compete successfully, the Commission was "unable to justify imposing the costs of mandatory unbundling to promote competition." *Order* ¶ 34 (JA).

The Commission reached a different conclusion regarding local exchange service and exchange access service. It explained that the market for those services "does not share the competitive conditions" that exist in the wireless and long-distance markets. *Order* ¶ 38 (JA). The Commission had never found – nor had the Court in *USTA II* suggested – that the local services market featured the degree of competition that characterized the wireless and long-distance markets. *Ibid.* In addition, the Commission concluded: "[T]o the extent that competition has evolved in the local exchange services market, … such competition has not evolved without UNEs.… [C]ompetition in this market has been substantially affected by, if not enabled by, the availability of UNEs." *Ibid.*

The Commission went on to determine that the availability of tariffed special access did not in itself warrant a finding of non-impairment in the local exchange market. Among other things, it rejected the premise that a CLEC's current use of special access to provide local exchange service "constitutes dispositive evidence that the carrier is able to compete – and thus [is] not impaired – without access to unbundled elements." *Order* ¶ 64 (JA). Contrasting the local exchange market with the wireless and long-distance markets, the Commission noted that "carriers make only limited use of special access offerings" to provide local service. *Ibid.* (JA

). As for those CLECs that do use special access in local markets, the Commission found evidence that many of them use special access not because it enables them "to economically compete long-term, but rather because, for various reasons, use of special access has been a necessary precondition to eventual UNE-based competition." *Ibid.* For example, CLECs demonstrated that they often purchased special access circuits "because they encountered difficulties in purchasing the circuits as UNEs." *Order* ¶ 231 (JA). In particular, CLECs complained that some ILECs refused to perform routine network modifications that were needed to provide access to certain UNEs. *Order* ¶ 64 & n.181 (JA -); *see also USTA II,* 359 F.3d at 577-78 (rejecting the ILECs' challenges to the FCC's network modification requirements).

Even assuming that some CLECs are profitably providing local service via special access, the Commission found record evidence "that the availability of UNEs is itself a check on special access pricing, and that elimination of UNE availability to customers using tariffed alternatives might preclude competition using those tariffed services going forward." *Order* ¶ 65 (JA). Specifically, the Commission determined that a rule denying UNE access to CLECs solely because they have access to tariffed alternatives would create an unacceptable risk that "incumbent carriers could strategically manipulate the price of their direct competitors' wholesale inputs to prevent competition in the downstream retail market" by placing CLECs in "price squeezes." *Order* ¶ 63 (JA).

The Commission also concluded that a rule foreclosing access to a UNE solely because a requesting carrier could use a tariffed ILEC alternative would be administratively "impracticable." *Order* ¶ 54 (JA). It explained that any assessment of the impact of special access in specific markets would require an analysis of the wide variety of special access rates and terms as well as the different revenue opportunities in each geographic market. *Order* ¶¶ 54-

58 (JA -). In the Commission's judgment, such a complex, fact-intensive inquiry would require "resources far beyond those available to this Commission." *Order* ¶ 58 (JA).

In addition, the Commission found that "the language and structure" of the 1996 Act "militate against a bar on UNE access wherever carriers could compete using special access." *Order* ¶ 50 (JA). By allowing competitors to lease incumbent facilities at cost-based rates, sections 251 and 252 created a "novel ratesetting" system "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Order* ¶ 51 (JA) (quoting *Verizon,* 535 U.S. at 489). The Commission reasoned that if Congress meant to promote competition aggressively through this new unbundling regime, it could not have intended to allow ILECs to evade unbundling simply by offering tariffed special access services, which were already widely available before the 1996 Act was passed. *Order* ¶¶ 51-52 (JA -). The Commission further determined that if ILECs could avoid unbundling obligations by providing a federally tariffed special access alternative, they would effectively deprive the states of any role in implementing the Act's local competition provisions – an outcome at odds with congressional intent. *Order* ¶ 53 (JA -) (citing *AT&T*, 525 U.S. at 377-86).

Having concluded that the availability of special access should not in itself preclude UNE access in local markets, the Commission also decided to continue to permit CLECs to convert existing special access arrangements to UNEs, "provided that the [CLEC] seeking to convert such services satisfies any applicable eligibility criteria" for obtaining the UNEs. *Order* ¶ 229 (JA). The Commission rejected the ILECs' call for a blanket prohibition on conversions for three reasons. *First*, the agency noted that the scope of potential conversions will be significantly reduced under the new eligibility rules, which "prevent the use of UNEs – and therefore also prevent the conversion of special access circuits to UNEs – where carriers would use them exclusively to provide" long-distance or wireless service. *Order* ¶ 230 (JA -). *Second*, the Commission found that a prohibition on conversions would be "inconsistent" with the agency's determination that "the record does not establish a lack of impairment where [CLECs] are using special access facilities." *Order* ¶ 231 (JA -). In light of that determination, the Commission reasoned that "a bar on conversions would give rise to 'anomalies, as CLECs hitherto relying on special access might be barred from access to [UNEs], while a similarly situated CLEC that had just entered the market would not be barred.'" *Ibid.* (JA) (quoting *USTA II*, 359 F.3d at 593). *Third*, the Commission concluded that a bar on conversions would spawn intractable "line-drawing and administrative difficulties," requiring the agency to assess on a case-by-case basis whether "a series of distinct transactions" between an ILEC and a CLEC amounts to a "conversion." *Order* ¶ 232 (JA).[4]

(3) High-Capacity Facilities

In the wake of *USTA II*, the FCC developed new tests for assessing whether CLECs would be impaired without unbundled access to DS1 and DS3 loops and transport trunks. First, the agency defined the relevant markets for evaluating impairment for these high-capacity facilities. It decided to "measure impairment with regard to dedicated transport on a route-by-route basis." *Order* ¶ 79 (JA). For loops, the Commission focused its impairment inquiry on the area served by a wire center. *Order* ¶ 155 (JA).

Then, on the basis of a voluminous record, the Commission identified two proxies for determining, in particular markets, whether entry would be economic without unbundled DS1 or

[4] Some of the ILECs moved for a stay of the Commission's rule authorizing conversions. By order dated June 1, 2005, the Court denied the stay motion.

DS3 facilities: (1) the extent of fiber-based collocation; and (2) business line density. The record showed "a correlation between the number of business lines and/or fiber collocations in a wire center and a revenue opportunity sufficient to lead to facilities duplication" in the area served by the wire center. *Order* ¶ 43 (JA). Fiber-based collocation "indicates the presence of competitive transport facilities." *Order* ¶ 96 (JA). It is also "a good indicator of the potential for competitive deployment of fiber rings" – an essential prerequisite to the deployment of competitive loops. *Order* ¶ 167 (JA). Similarly, a wire center with a large number of business lines is typically located "in or near a large central business district, which is likely to house multiple competitive fiber rings." *Ibid.* And because business customers generate "a high level of demand for telecommunications services," wire centers with heavy concentrations of business lines "are most likely to attract and support" competitive "transmission facilities that duplicate the [ILEC's] network." *Order* ¶ 103 (JA).

The Commission incorporated these factors into its new tests for gauging impairment. It found that the unavailability of unbundled DS1 or DS3 facilities would impair competitive entry in wire centers that do not contain certain minimum numbers of collocators and/or business lines. Using these proxies, the Commission reasoned that higher numerical thresholds should apply to DS1 facilities because they present less substantial revenue opportunities than higher-capacity DS3 facilities do. *Order* ¶¶ 86, 170-171 (JA - , -). For similar reasons, the Commission set a higher bar for establishing non-impairment for loops than for transport. It explained that loops, which serve individual customers at specific locations, offer less revenue potential than transport facilities, which are used to aggregate the traffic of multiple customers. *Order* ¶¶ 71, 152 (JA - ,).

Taking all of these considerations into account, the FCC adopted the following tests for assessing impairment for high-capacity facilities:

- competing carriers are impaired without access to DS1 transport except on routes connecting two wire centers, each of which has at least four fiber-based collocators *or* at least 38,000 business lines;

- competing carriers are impaired without access to DS3 transport except on routes connecting two wire centers, each of which has at least three fiber-based collocators *or* at least 24,000 business lines;

- competing carriers are impaired without access to DS1 loops except within the service area of a wire center containing at least four fiber-based collocators *and* at least 60,000 business lines; and

- competing carriers are impaired without access to DS3 loops except within the service area of a wire center containing at least four fiber-based collocators *and* at least 38,000 business lines.

Order ¶¶ 66, 146 (JA ,).

Because these tests are "based upon objective and readily obtainable facts," the Commission decided that a requesting carrier could self-certify that a UNE it seeks to obtain meets the applicable test. *Order* ¶ 234 (JA). An ILEC must immediately process such a request. *Ibid.* If the ILEC seeks to challenge whether the UNE meets the applicable test, it must first provide the UNE and then raise a challenge through the dispute resolution procedures prescribed by its interconnection agreements. *Ibid.* The Commission recognized that, under this process, state commissions will generally decide any factual disputes involving the tests. *Ibid.* (JA -).

The Commission designed these tests to do more than detect markets where deployment of competitive facilities has already occurred. Through the use of proxies, the Commission sought to ascertain markets with the potential for facilities-based competition "by inferring from competitors' facilities deployment in one market the ability of a reasonably efficient competitor to enter another, similar market in an economic manner." *Order* ¶ 43 (JA). For example, although CLECs typically do not provision stand-alone DS1 loops, the record showed that some CLECs have deployed higher-capacity loops and then "channelized" (*i.e.*, subdivided) them to serve a particular customer at the DS1 level. *Order* ¶¶ 170-171 (JA -). The Commission crafted its impairment test for DS1 loops to identify markets where such channelization is economically feasible. *Order* ¶¶ 171-173 (JA -).

The Commission considered and rejected various alternative approaches to assessing impairment for DS1 and DS3 facilities. Among other things, it declined to undertake a building-by-building evaluation of competitive loop deployment. The Commission determined that a nationwide building-specific analysis would entail "detailed and potentially subjective building-by-building and loop-by-loop evaluations … for between 700,000 and 3 million buildings" on the basis of information that is neither readily available nor easily verifiable. *Order* ¶ 159 (JA). Even in the unlikely event that the agency could somehow complete this extremely difficult task, the Commission found it "inevitable" that ILECs and CLECs would dispute many of the Commission's determinations, "building-by-building, raising the prospect of expensive, fact-intensive litigation for years to come." *Ibid.* These considerations persuaded the Commission that a building-specific impairment test "would be impracticable and unadministrable." *Order* ¶ 157 (JA).

The agency also rejected the ILECs' call for a nationwide finding of non-impairment concerning high-capacity loops. *Order* ¶ 187 (JA). In arguing for such a finding, the ILECs had submitted "maps showing competitive fiber deployment in downtown parts of major metropolitan areas." *Ibid.* The Commission found that those maps had "little probative value in an impairment analysis for DS1 or DS3 loops" because they did "not specify the capacity of service demanded in particular locations" or "the placement of splice points" on fiber rings. *Ibid.* (JA -). Without such information, the Commission found it impossible to discern from the ILECs' maps "whether it is economic" for CLECs in a given area to deploy their own loops "to serve customers at the DS1, or even the single DS3, capacity level." *Ibid.* (JA).[5] The Commission further noted that the ILECs' maps failed to indicate whether competitive fiber facilities were being used to provide local exchange service – the focus of the FCC's impairment inquiry. *Order* ¶ 188 (JA).

Ultimately, the Commission concluded that the ILECs' maps could not justify "any particular approach to unbundling." *Order* ¶ 189 (JA). Although those maps purported to show competitively deployed fiber in major cities within Metropolitan Statistical Areas ("MSAs"), the Commission found that the maps did "not indicate sufficiently pervasive deployment to justify an MSA-wide bar on unbundling." *Ibid.* The agency observed that market conditions can "vary significantly from one part of an MSA to another" because each MSA covers a broad geographic region, typically including rural and suburban communities that bear little resemblance to the urban business districts depicted in the ILECs' maps. *Order* ¶¶ 82, 164 (JA ,). Recognizing the need to account for this "geographic nuance," the Commission determined that the ILECs' maps "provide no administrable mechanism" for identifying the

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[5] Information about the location of splice points is crucial to evaluating the cost of competitive loop deployment. If a building is not directly connected to a competitive fiber ring, a CLEC cannot use its own loop to serve the building unless it constructs a "lateral" fiber connecting the building to a splice point on a CLEC fiber ring. If the building is not close to any of the CLEC's splice points, the cost of constructing a lateral is generally prohibitive. *Order* ¶ 154 (JA -).

areas within each MSA where competitors are impaired without unbundled high-capacity loops. *Order* ¶ 189 (JA).[6]

SUMMARY OF ARGUMENT

The Communications Act requires the Federal Communications Commission to decide whether to mandate the unbundling of specific network elements under 47 U.S.C. § 251(c)(3). In deciding whether nonproprietary elements should be unbundled, the FCC must "consider, at a minimum," whether "the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(B) (emphasis added). Since the 1996 Act became law, the Commission and the courts have engaged in a dialogue over the meaning and implementation of this "impairment" standard. On three previous occasions, the agency adopted rules implementing the standard. Each time, the courts remanded the rules, directing the agency to make further refinements to its approach. The *Order* on review reflects the culmination of the Commission's efforts to refine its unbundling rules and to draw applicable lines in accordance with the guidance provided by this Court and the Supreme Court.

Consistent with the principles that this Court articulated in *USTA I* and *USTA II,* the FCC's new unbundling rules strike a fair and reasonable balance between the costs and benefits of unbundling. When the record contained no persuasive evidence that competitors in the mass market were impaired without unbundled switching – and substantial evidence that switch

[6] The FCC and the Department of Justice are currently reviewing applications for approval of two major telecommunications mergers: SBC's proposed acquisition of AT&T and Verizon's proposed acquisition of MCI. If those acquisitions are approved, the ILECs would need to revise substantially their maps of competitive fiber deployment. According to the ILECs, AT&T and MCI account for nearly half of the local route miles of fiber deployed by competitors. *See* UNE Fact Report 2004 at III-4, Table 1 (JA).

unbundling discouraged facilities-based competition – the Commission discontinued the unbundling of mass market switches, subject to a reasonable transition period. In contrast, when the record revealed no convincing evidence that CLECs could overcome impairment in local markets merely by using special access, the Commission reasonably found that the availability of special access in itself should not foreclose CLECs from obtaining UNEs in local markets. And when the record showed evidence that a lack of unbundled high-capacity facilities would cause impairment in some areas but not others, the Commission developed sensible, administrable tests for identifying those areas where deployment of competitive facilities is economically feasible.

Although petitioners attack various aspects of these reasonable agency actions, none of their challenges can withstand scrutiny. In the end, their arguments amount to nothing more than quarrels with the lines that the Commission drew in making its unbundling determinations. The agency has wide discretion to draw such lines, and it reasonably exercised that discretion here. The Court should uphold the Commission's rules.[7]

I. The record in this proceeding amply supported the Commission's decision to eliminate mandatory unbundling of mass market switching. The agency had required such unbundling in the *Triennial Review Order* because it had determined that inefficiencies in the hot cut process impaired the use of non-ILEC switches by erecting economic and operational barriers to entry. The record here showed that the BOCs' development of more efficient and less expensive hot cut procedures had removed those barriers. The Commission found no compelling evidence of any

[7] The Commission's impairment tests and the UNE requirements at issue in this case implement the specialized UNE provisions of the Communications Act. Accordingly, they are distinct from the market definition standards and analyses of entry and competitive effects that the Department of Justice applies in enforcing the antitrust laws, and they may lead to different results.

other barriers to the use of competitive switches in the mass market. It noted that CLECs had already extensively deployed their own switches to serve enterprise customers, and it saw no good reason why CLECs could not use those same switches to serve the mass market given the improvements in the hot cut process. In any event, even assuming that some limited impairment might exist in isolated markets without unbundled mass market switching, the Commission reasonably concluded that the costs of switch unbundling outweighed the benefits. It based that conclusion on substantial evidence that unbundled switching had served as a disincentive to facilities-based competition.

II. Because switches are used to complete interstate calls, there is no question that the FCC has the authority to set transitional switching rates. The Commission reasonably exercised that authority here. After exempting mass market switches from unbundling, the agency adopted a transition plan to guard against market disruption. Under that plan, ILECs must continue to offer CLECs access to existing UNE-P arrangements (which include switching) for the next 12 months at a transitional rate that is one dollar above the prevailing UNE-P rate. (During the transition, CLECs may not buy additional UNE-P arrangements.) The transitional rate reflects a moderate increase in monthly UNE-P prices, which typically range between $20 and $25. The Commission reasonably set the transitional rate at a level that insures CLECs against a sudden spike in ILEC switching rates while protecting the interests of ILECs in gaining prompt relief from switch unbundling requirements.

III. In response to the Court's remand in *USTA II,* the FCC carefully considered the role that special access should play in the impairment inquiry. In light of the Court's conclusion that users of special access had engaged in "robust" competition in the wireless and long-distance markets, the Commission properly declined to give CLECs access to UNEs solely to provide wireless or long-distance service. As for the local exchange market, where competition is far from "robust," the Commission reasonably reached a different conclusion. It determined that competitors' use of special access to provide local service does not in itself demonstrate a lack of impairment in local markets. The agency based this finding on several factors, including two (administrability and the risk of ILEC abuse) that the Court in *USTA II* explicitly authorized the agency to take into account. *See USTA II*, 359 F.3d at 577.

Having found that a CLEC's use of special access does not in itself establish the carrier's lack of impairment, the Commission saw no reason to prohibit CLECs that use special access from converting to UNEs in markets where other CLECs have access to those UNEs. The Commission's rules had authorized such conversions for several years; and the Commission reasoned that a bar on such conversions would create anomalies by precluding current users of special access from obtaining UNEs while placing no restrictions on UNE access for other CLECs. In addition, the Commission found evidence that the availability of UNEs serves to constrain special access prices. In view of that evidence, the Commission reasonably concluded that a bar on special access conversions would increase the risk that ILECs might create a price squeeze by substantially raising special access rates.

IV. The Commission reasonably decided to assess high-capacity loop and transport impairment on the basis of evidence of actual and potential facilities deployment at the wire center level. The Commission considered alternative impairment tests proposed by the parties, evaluated the strengths and weaknesses of each, and rationally decided to adopt wire center tests that are based on objective, readily available evidence. The record amply supports the Commission's finding that fiber-based collocation and business line density are reasonable indicators of actual and potential competitive deployment within wire centers. Using those proxies, the Commission adopted sensible cutoffs for unbundling. Although both the ILECs and the CLECs object to the wire center tests, they have not shown that the lines the Commission drew are unreasonable. Because the Commission offered a sound explanation, supported by the record, for its choices among competing approaches, the Court should defer to the agency's policy judgment.

V. In this proceeding, the Commission neither preempted any particular state action nor forbore from enforcing any statutory requirement or FCC rule. Therefore, the NJDRA's claims concerning preemption and the constitutionality of forbearance are not properly before this Court. The agency in this case did not issue a final, reviewable decision concerning either of those issues. Moreover, neither issue is ripe for judicial review.

STANDARD OF REVIEW

Insofar as petitioners challenge the FCC's interpretation of the Communications Act, the Court's review is governed by *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Although the Act directs the FCC to consider whether the unavailability of UNEs would "impair" a competing carrier's ability "to provide the services that it seeks to offer," 47 U.S.C. § 251(d)(2)(B), Congress "gave no detail as to either the kind or degree of impairment" that would justify unbundling. *USTA I*, 290 F.3d at 422. Subsequently, both this Court and the Supreme Court have given the Commission considerable guidance concerning the interpretation of this ambiguous statute. Ultimately, if the Commission's reading of the statute is reasonable, *Chevron* requires this Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688, 2699 (2005).

To the extent that petitioners challenge the reasonableness of the FCC's revised unbundling rules, the Court must uphold those rules unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under this highly deferential standard of review, the [Court] presumes the validity of agency action." *Cellco Partnership v. FCC,* 357 F.3d 88, 93 (D.C. Cir. 2004) (internal quotations omitted). The Court may "reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *Vernal Enterprises, Inc. v. FCC,* 355 F.3d 650, 658 (D.C. Cir. 2004) (internal quotations omitted). "The job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility in deciding what and how [UNEs] must be leased and the way to set rates for leasing them." *Verizon,* 535 U.S. at 539.

<u>ARGUMENT</u>

I. THE COMMISSION REASONABLY DECIDED TO END MANDATORY UNBUNDLING OF MASS MARKET SWITCHING.

Typically, before a CLEC can use its own switch to serve a residential customer, an ILEC must disconnect the customer's phone line from an incumbent switch and reconnect it to the CLEC's switch. This process is called a "hot cut." *See AT&T Corp. v. FCC,* 220 F.3d 607, 625 (D.C. Cir. 2000). When the Commission mandated unbundling of mass market switching in the *Triennial Review Order,* it based its national impairment finding solely on operational and economic barriers associated with hot cuts. *See USTA II,* 359 F.3d at 569; *Triennial Review Order* ¶ 476. Since then, "new, improved hot cut procedures" have effectively removed those entry barriers. *Order* ¶ 210 (JA).

To minimize service disruptions and delays, the BOCs have developed "batch" hot cut procedures that more efficiently process large volumes of hot cuts. *Order* ¶¶ 211-212 (JA -). The adoption of these procedures confirmed the Commission's earlier findings under 47 U.S.C. § 271 that BOCs could adapt their hot cut capabilities to accommodate large increases in demand. *Order* ¶ 214 (JA). In addition, BOCs' nonrecurring charges for performing hot cuts, which the FCC had previously cited as an economic impediment to entry, have significantly declined. *Order* ¶ 213 (JA). Future hot cut demand, moreover, is likely to be less substantial than the Commission once expected because many CLECs are pursuing alternative entry strategies that do not require hot cuts. *Order* ¶ 215 (JA). Taking all of these developments into account, the Commission reasonably concluded that the hot cut process no longer poses a barrier to the use of competitive switches in the mass market.

The Commission likewise found no convincing evidence of any other entry barriers that might impair CLECs without access to unbundled ILEC switching. *Order* ¶¶ 222-225 (JA -). Indeed, the record in this proceeding documented significant deployment of competitive switches, used primarily to serve enterprise, or large business, customers. By the end of 2003, CLECs had deployed approximately 1,200 circuit switches and more than 8,700 packet switches. *Order* ¶ 206 & n.545 (JA -). The record also showed that some CLECs are using competitive switches to serve mass market customers. According to ILEC data, "competitive carriers are serving over 3 million mass market lines with [non-ILEC] switches." *Ibid.* In addition, state commissions from New York, California, Texas, and Maryland all submitted evidence that CLECs are "serving the mass market using self-provided switches." *Order* ¶ 208 (JA). This considerable body of evidence furnished by state commissions undercuts the

CLECs' claim (Br. 31) that the FCC based its analysis of mass market competition exclusively on the ILECs' representations.

In light of all this evidence, the FCC reasonably determined that CLECs generally are not impaired without access to unbundled switches. It therefore decided to eliminate mandatory unbundling of mass market switching. That decision has been challenged by the NJDRA, the National Association of State Utility Consumer Advocates ("NASUCA"), and numerous CLECs. None of those petitioners contests the FCC's conclusion that hot cut inefficiencies no longer cause impairment. Nor do petitioners identify any other sort of barrier that would make competitive entry uneconomic without unbundled switching. Thus, while petitioners disagree with certain aspects of the FCC's analysis, they have given the Court no good reason to disturb the agency's reasonable decision to terminate switch unbundling.

As a threshold matter, the Court should reject NASUCA's transparent attempt to relitigate *USTA I* and *USTA II*. While NASUCA may believe that those decisions "improperly narrowed" the definition of impairment (Br. 9-11), the FCC would have committed reversible error if it had not complied with the mandates of those decisions. Indeed, panels of this Court are bound to follow those precedents. *See National Mining Ass'n v. Fowler*, 324 F.3d 752, 760 (D.C. Cir. 2003).

The Court also should dismiss the NJDRA's claim (Br. 6-7) that the Commission provided inadequate notice before adopting a "reasonably efficient competitor" standard for evaluating impairment. The NJDRA waived that claim by failing to raise it before the Commission. *See* 47 U.S.C. § 405; *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998). In any event, the claim lacks merit. The agency satisfied APA notice requirements here. Its rulemaking notice sought comment on how to address the Court's request for clarification of the agency's concept of "uneconomic entry." *Interim Order* ¶¶ 8-9 (JA -) (citing *USTA II*, 359 F.3d at 571-73). The Court had asked: "Uneconomic by whom?" *USTA II*, 359 F.3d at 572. In the *Order*, the Commission replied: Uneconomic by a "reasonably efficient competitor." *Order* ¶ 24 (JA). It justified that standard as a clarification of its *Triennial Review Order* standard, as consistent with the general range of comments in this proceeding, and as a sensible approach to resolving the impairment question in a broad rulemaking of general applicability. *Order* ¶¶ 24-28 (JA -).

Applying this revised impairment test, the Commission found that CLECs nationwide are not impaired without unbundled mass market switching. Petitioners argue that this nationwide finding contravened the Court's instruction to conduct a "nuanced" or "granular" impairment analysis that distinguishes among specific markets. CLEC Br. 28-30; NASUCA Br. 11-12; NJDRA Br. 8. For example, NASUCA contends (Br. 15-16) that the agency improperly failed to differentiate between residential customers and small businesses. Similarly, the CLECs complain (Br. 34) that the Commission did not explore "narrower alternatives to a national non-impairment rule." The Court has made clear, however, that the Commission need only consider market-specific alternatives to a general rule if "there is evidence that markets vary decisively (by reference to [the FCC's] impairment criteria)." *USTA II,* 359 F.3d at 570. The record here contained no such evidence concerning switches. To the contrary, the Commission found "no significant variation in switch deployment throughout the country" and no solid evidence of entry barriers in any particular markets, so it reasonably chose to "adopt a national approach" when analyzing impairment for mass market switching. *Order* ¶ 205 (JA).

NASUCA and the NJDRA contend that state-collected data verified "impairment" in particular states under the "triggers" prescribed by the *Triennial Review Order*. NASUCA Br.

14-15; NJDRA Br. 8-9. But those triggers no longer provide an accurate barometer of impairment; they rest on the now-discarded finding, based on an earlier record, that shortcomings in the hot cut process impaired competition with non-ILEC switches. *See Order* ¶ 202 (JA). Given the undisputed and dramatic improvements in hot cut procedures since the *Triennial Review Order,* the Commission properly refused to apply that order's impairment triggers, which presumed substantial hot cut problems that no longer exist.

The CLECs maintain that the states' evidence, by demonstrating a lack of facilities-based mass market competition, "proves that CLECs are impaired from competing in the mass market without unbundled local switching." CLEC Br. 36. That is incorrect. The fact that many CLECs have not used competitive switches in the mass market does not necessarily mean that they *cannot* do so. Impairment exists only where costs or structural barriers make investment in competitive facilities uneconomic or "wasteful." *USTA I,* 290 F.3d at 427; *see also USTA II,* 359 F.3d at 571-72. The Commission found no clear evidence of any such impediments to the use of CLEC switches in the mass market.[8]

Moreover, the extensive deployment of competitive switches vitiates CLECs' claims of impairment. This Court has "expressed skepticism regarding whether there could be impairment in markets 'where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis.'" *USTA II*, 359 F.3d at 574 (quoting *USTA I*, 290 F.3d at 422). Competitive switches have been significantly deployed in diverse markets throughout the

[8] The CLECs assert that they and the states "presented extensive unrebutted evidence that CLECs could not practically and economically compete in the mass market using non-ILEC facilities." CLEC Br. 36. The evidence to which they refer merely showed that CLECs are not now using competitive switches in the mass market. *See* PACE Coalition Comments at 39-53 (JA -). The CLECs have not pointed to any record evidence that connected the lack of facilities-based mass market competition to any economic or structural barrier to entry.

country. *Order* ¶¶ 205-206 & n.542 (JA). Although many of those switches are now being used exclusively to serve enterprise customers, nothing in the record compels the conclusion that CLECs could not economically use those same switches to serve the mass market now that hot cut problems have been corrected. In addition, by using newer technologies such as packet switches, CLECs are capable of serving even wider geographic areas than incumbent switches can serve. *Order* ¶ 207 (JA). Thus, contrary to petitioners' contention (CLEC Br. 32-34; NJDRA Br. 8), it was reasonable for the FCC to infer that CLECs could serve the mass market with switches they have already deployed to serve enterprise customers.[9]

In any event, even assuming that some limited impairment might still exist in isolated markets, the Commission reasonably found that the costs of unbundling mass market switching outweigh the benefits. *Order* ¶¶ 218-221 (JA -). Heeding the Court's admonition to "take into account … the costs of unbundling (such as discouragement of investment in innovation)," *USTA II*, 359 F.3d at 572, the Commission determined that continued unbundling of mass market switches "would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition." *Order* ¶ 218 (JA). The record showed that, particularly in residential markets, facilities-based CLECs (such as cable operators) are "discouraged from innovating and investing in new facilities" because they cannot use their own

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[9] Although the CLECs claim that the enterprise market and the mass market "are not similarly situated in terms of entry barriers" (Br. 33), they base that assertion primarily on the FCC's distinction between those markets in the *Triennial Review Order*. The Commission there identified only one potential source of impairment that was unique to the mass market: the hot cut process for migrating mass market customers from ILEC switches to CLEC switches. *Triennial Review Order* ¶ 459. Now that the BOCs have adopted more efficient and less expensive hot cut procedures, there is no reason to believe that competitors face more substantial entry barriers in the mass market than in the enterprise market, insofar as switch availability is concerned. *See Order* ¶¶ 210-215 (JA -).

facilities to compete effectively with competitors leasing UNE-P at TELRIC rates. *Order* ¶ 220 & nn.603, 605 (JA -). Under these circumstances, the Commission reasonably declined to unbundle switching anywhere, notwithstanding the possibility that CLECs "may face some limited impairment in particular subsets of the mass market." *Order* ¶ 221 (JA). This Court has upheld the Commission's authority to refrain from unbundling, "even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment." *USTA II,* 359 F.3d at 580.

The CLECs dispute the Commission's finding that unbundled mass market switching creates investment disincentives. They contend that TELRIC rates are much higher than the Commission's analysis suggests. CLEC Br. 35-36. The CLECs' characterization of TELRIC rates is just not credible. If (as the CLECs assert) TELRIC switching rates are at or above "the upper end" of a "just and reasonable range" (Br. 36), then presumably CLECs would have stopped paying high UNE rates and started serving their mass market customers with the switches they had already purchased and deployed to serve enterprise customers. "Given the sunk costs already invested in deployed switches," CLECs should have had "every incentive to spread those costs over a larger base" by using their own switches to serve mass market customers as well as enterprise customers. *Triennial Review Order* at n.1371. Yet CLECs "never converted" their mass market service to their own switches, even after they "acquired a significant number of [mass market] customers in densely populated areas." *Order* ¶ 220 (JA). Competitors' failure to make this transition strongly suggests that unbundling has even discouraged CLECs from using switches they have already bought and deployed.

In explaining this phenomenon, independent industry analysts have attributed the scarcity of facilities-based mass market competition to the availability of TELRIC-based UNE-P, which has allowed CLECs to reap higher profits by leasing UNEs than they could by using their own facilities. *See Order* at n.600 (JA). Consistent with that evidence, the FCC reasonably concluded that it could most effectively achieve "the Act's aim of encouraging facilities-based competition" by eliminating switch unbundling requirements. *Order* ¶ 219 (JA).

There is no basis for the CLECs' claim (Br. 37) that the availability of unbundled mass market switching stimulated competitive investment in broadband infrastructure for advanced services. The only evidence they cite for this proposition is a policy paper that analyzes how broadband deployment is affected by *loop* unbundling. *See* PACE Coalition Comments, Exhibit 7, Phoenix Center Policy Paper No. 19, at 1 (JA). The CLECs have not pointed to any evidence that *switch* unbundling has spurred broadband investment. Indeed, it is more likely that switch unbundling has *deterred* such investment. The Commission previously concluded that it could best promote investment in broadband facilities by *removing* unbundling requirements, and this Court upheld that conclusion as reasonable. *USTA II,* 359 F.3d at 580-82.

Finally, the CLECs are wrong to suggest (Br. 38) that the Commission should have revised its cost-benefit analysis of switch unbundling in light of the BOCs' independent obligation to lease access to local switching as a precondition to entering the long-distance market under section 271. *See* 47 U.S.C. § 271(c)(2)(B)(vi). Even if the CLECs are correct that the BOCs "have already absorbed the costs" of section 271 compliance into their business plans (Br. 38), the Commission reasonably found that a different set of costs – the disincentive effects on CLEC investment – militated against continued unbundling of mass market switching. Those costs are substantial. The disincentives created by switch unbundling have stunted the growth of facilities-based competition. *See Order* ¶ 220 (JA -); *see also USTA I,* 290 F.3d at 427 (citing "the disincentive to invest in innovation" as one of the "costs" of unbundling). In view of those considerable costs, and in the absence of any hard evidence that competitors would be impaired without unbundled switches, the Commission reasonably decided to eliminate unbundling of mass market switching under section 251(c)(3).

II. THE COMMISSION ESTABLISHED REASONABLE TRANSITIONAL RATES FOR MASS MARKET SWITCHING.

After eliminating unbundling requirements for mass market switching, the Commission adopted a transition plan in order to avert market disruption. *Order* ¶¶ 226-228 (JA -). Under the plan, CLECs have 12 months from the effective date of the *Order* (March 11, 2005) to move their existing customers from unbundled switches to alternative service arrangements. *Order* ¶ 227 (JA). During the 12-month transition period, unbundled switching will be priced one dollar above the highest UNE-P rate that state commissions had authorized between June 15, 2004, and the effective date of the *Order*. *Order* ¶ 228 (JA). The Commission explained that this "moderate" price increase would "help ensure an orderly transition by mitigating the rate shock" that CLECs might suffer "if TELRIC pricing were immediately eliminated" for mass market switching. *Ibid.* (JA -). The Commission also found that the rate increase and "the limited duration of the transition" would help protect "the interests of [ILECs]" in obtaining prompt relief from the burdens of unbundling. *Ibid.* (JA).

The Commission "is entitled to substantial deference" when it adopts interim measures to implement "large-scale revisions 'in a manner that would cause the least upheaval in the industry.'" *ACS of Anchorage, Inc. v. FCC,* 290 F.3d 403, 410 (D.C. Cir. 2002) (quoting *MCI Telecommunications Corp. v. FCC,* 750 F.2d 135, 141 (D.C. Cir. 1984)). "Avoidance of market disruption pending broader reforms is … a standard and accepted justification for a temporary rule." *Competitive Telecommunications Ass'n v. FCC,* 309 F.3d 8, 14 (D.C. Cir. 2002)

("*CompTel*"). The Commission's transitional rates for mass market switching are reasonably designed to prevent market disruption while carriers adjust to the elimination of switch unbundling requirements. Petitioners' attacks on these interim rates lack merit.

There is no basis for the NJDRA's claim (Br. 12) that the FCC "is improperly setting intrastate rates." The NJDRA mistakenly assumes that mass market switches are purely "intrastate" facilities that fall exclusively within the states' purview under section 2(b) of the Communications Act, 47 U.S.C. § 152(b). To the contrary, switching facilities are used to convey *both* intrastate *and* interstate telephone calls. As this Court has long recognized, the Communications Act authorizes the FCC to regulate facilities that are "used to complete even a single interstate call." *National Association of Regulatory Utility Commissioners v. FCC,* 746 F.2d 1492, 1498 (D.C. Cir. 1984). Because switches are used to route interstate calls, the FCC clearly has jurisdiction to set switching rates.[10]

The NJDRA and the CLECs complain that the Commission did not adequately explain how it selected the amount of the interim increase in switching rates. NJDRA Br. 11-12; CLEC Br. 38-41. To be sure, the Commission did not articulate a detailed rationale for increasing rates by one dollar. Nonetheless, the agency's path can reasonably be discerned. *See Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285-86 (1974); *ACS of Anchorage,* 290 F.3d at 408. The Commission explained that the interim rate increase struck a

[10] The Supreme Court's decision in *AT&T*, 525 U.S. at 384, does not require a contrary conclusion. The Court there examined the respective roles of federal and state regulators in setting UNE rates under 47 U.S.C. § 252(d)(1). By its terms, that statutory pricing provision applies only to network elements that are subject to unbundling under section 251(c)(3). Now that mass market switches are exempt from unbundling, section 252(d)(1) does not govern the pricing of those facilities. In any event, the FCC's transitional rate does not supplant the states' authority to set rates. It takes the state rates as a given and adds a reasonable surcharge to achieve legitimate federal transitional purposes. The state role in this calculation is paramount.

reasonable balance between the competing interests of CLECs and ILECs, protecting CLECs from a sudden spike in switching rates while relieving ILECs of TELRIC pricing requirements. *Order* ¶ 228 (JA -). If the Commission had not set transitional rates, CLECs likely would have faced much higher switching rates immediately after the *Order* took effect. In the Commission's considered judgment, the interim rates reflect a "moderate" increase in prevailing rates. *Ibid.* (JA).[11] Such a moderate rate increase falls comfortably within the "just and reasonable" range of rates. *See* 47 U.S.C. § 201(b). The law requires nothing more.

The CLECs question the reasonableness of *any* rate increase. They assert that rates for unbundled switching were already at or above "the high end" of "the just and reasonable range" before the FCC prescribed the interim rate increase. CLEC Br. 40. As we explained in Part I above, the CLECs' own conduct is inconsistent with their claim that TELRIC-based switching rates are high or excessive. The CLECs continued to pay TELRIC rates even though they could have served their mass market customers with non-ILEC switches that they had already purchased and deployed to serve enterprise customers. *Order* ¶ 220 (JA -). Competitors' persistent reliance on UNE-P – even after extensive deployment of competitive switches – provides powerful evidence that TELRIC-based switching rates were not even close to "the high end" of the permissible range of rates under the "just and reasonable" standard of section 201(b). Consequently, the moderate one-dollar increase in switching rates during the 12-month transition period is neither unjust nor unreasonable.

[11] In order to use unbundled mass market switching, CLECs typically purchase the entire UNE-P package of elements, which includes unbundled switching, loops, and transport. According to the CLECs' own estimates, the largest ILECs were charging an average of roughly $20-25 per month for each UNE-P line before the transitional rates took effect. *See* ACN Comments, Exhibit 6, at 6 (JA). A one-dollar transitional increase in a monthly UNE-P charge of $20-25 can hardly be regarded as excessive or unreasonable.

The NJDRA faults the FCC for failing to adopt any of the NJDRA's alternative rate-setting proposals. NJDRA Br. 12-13. In the ratemaking context, however, as long as the Commission chooses a reasonable approach from the available alternatives, "its selection of methods will be upheld 'even if the court thinks [that] a different decision would have been more reasonable or desirable.'" *Southwestern Bell Telephone Co. v. FCC,* 168 F.3d 1344, 1352 (D.C. Cir. 1999) (quoting *MCI Telecommunications Corp. v. FCC,* 675 F.2d 408, 413 (D.C. Cir. 1982)). Judicial review of FCC ratemaking decisions is "particularly deferential" because "agency ratemaking is far from an exact science and involves policy determinations in which the agency is acknowledged to have expertise." *Ibid.* (quoting *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 163 (D.C. Cir. 1995), *cert. denied,* 516 U.S. 1112 (1996)); *see also United States v. FCC,* 707 F.2d 610, 618 (D.C. Cir. 1983). Courts accord even greater deference to the FCC's adoption of interim or transitional rates to preserve market stability. *See, e.g., MCI,* 750 F.2d at 140-41; *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068, 1073-74 (8th Cir. 1997). Under this highly deferential standard of review, the FCC's interim switching rates plainly pass muster.

III. THE COMMISSION FULLY COMPLIED WITH THE COURT'S DIRECTIVE TO CONSIDER THE APPROPRIATE ROLE OF TARIFFED ILEC SPECIAL ACCESS SERVICES IN THE IMPAIRMENT INQUIRY.

In *USTA II,* the Court reversed the FCC's decision to make UNEs available to providers of wireless services. *USTA II,* 359 F.3d at 575-77. It found no justification for mandatory unbundling in the wireless market, where competitors' use of ILECs' special access services had allowed "competition not only to survive, but to flourish." *Id.* at 576. Noting that the use of special access had spawned similarly "robust competition" in the long-distance market, the Court declared that "the presence of robust competition" by users of special access "precludes a finding" that CLECs are impaired without UNEs in the wireless and long-distance markets. *Id.* at 592-93.

More generally, the Court concluded that the Commission had "arbitrarily exclud[ed]" tariffed ILEC services from its impairment analysis. *USTA II,* 359 F.3d at 577. The Court held that the Commission "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired." *Ibid.* But the Court did not specify how the agency should analyze the impact of special access in markets where competition is less than "robust." It entrusted that task to the agency's discretion, leaving the Commission "free to take into account such factors as administrability, risk of ILEC abuse, and the like." *Ibid.*

The Court made clear that it did not necessarily expect the Commission to remove unbundling requirements wherever ILECs offered a tariffed alternative: "[O]n an appropriate record the Commission might find impairment even when services were available from ILECs outside § 251(c)(3)." *USTA II*, 359 F.3d at 577. The Court also recognized that any assessment of whether special access alleviated impairment "might raise real" administrative "complications" due to "the ILECs' incentive to set the tariff price as high as possible and the vagaries of determining when that price gets so high that the 'impairment' threshold has been crossed." *Id.* at 576. "Those complications," the Court said, might "support a blanket rule treating the availability of ILEC tariffed service as irrelevant to impairment." *Ibid.*

The Commission on remand considered at length the appropriate role of tariffed services in the impairment inquiry. Consistent with the Court's analysis of the wireless and long-distance markets, the agency properly denied CLECs access to UNEs solely to provide wireless or long-distance service. *Order* ¶¶ 34-37 (JA -). The Commission reached a different conclusion with respect to the local exchange market, where competition "has been substantially affected by, if not enabled by, the availability of UNEs." *Order* ¶ 38 (JA). After closely examining a number of factors, including administrability and the risk of ILEC abuse (issues that the Court itself had identified as legitimate concerns), the Commission reasonably determined that competitors' use of special access to provide local service does not in itself conclusively demonstrate a lack of impairment in local markets. *Order* ¶¶ 50-65 (JA -). In light of that finding, the Commission reasonably declined to bar CLECs from converting existing special access arrangements to UNEs in markets where ILECs are required to offer UNEs. *Order* ¶¶ 229-232 (JA -).

The ILECs contend that the Commission improperly refused to consider the effect of special access on impairment in the local exchange market. ILEC Br. 18-27. They also maintain that the agency cannot lawfully authorize the conversion of special access services to UNEs. ILEC Br. 28-31. Neither claim has merit.

A. The Commission Reasonably Concluded That Competitors' Use Of Special Access To Provide Local Telephone Service Should Not In Itself Preclude Unbundling In The Local Exchange Market.

Unlike competitors in the wireless and long-distance markets, CLECs "make only limited use of special access offerings to provide service" in the local exchange market. *Order* ¶ 64 (JA).[12] Moreover, unlike the wireless and long-distance markets, the local exchange market has no history of "robust competition." *Cf. USTA II*, 359 F.3d at 575-77, 592-93. Competition has been slow to develop in local markets that were long monopolized by ILECs. To spur the growth of

[12] *See, e.g., Order* at n.477 (JA) (by Verizon's own reckoning, almost 80 percent of the demand for special access in its region is concentrated in just 8 percent of its wire centers).

local competition, Congress adopted the network unbundling provisions of the 1996 Act. *See Verizon*, 535 U.S. at 489; *AT&T*, 525 U.S. at 371. Given the vital role that Congress expected unbundling to play in opening local markets, the Commission reasoned that Congress could not have intended for ILECs to avoid unbundling simply because they were offering special access. Otherwise, the special access services that ILECs were already offering when the 1996 Act became law would have stifled unbundling from the start, effectively nullifying one of the key statutory mechanisms for cultivating local competition. *Order* ¶¶ 51-52 (JA -).

In this regard, the agreements that Congress mandated for UNEs under sections 251 and 252 serve a purpose independent of the price levels that they establish. The "genuine, facilities-based competition" that the 1996 Act is supposed to stimulate, *USTA II*, 359 F.3d at 576, can thrive only if CLECs make substantial long-term investments in their own facilities. Insofar as their business is dependent on relationships with their largest competitors, they are likely to make such investment commitments only if the terms of those relationships can be assured for a similarly long term. *Cf. United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956) (explaining the role of contracts in encouraging investment under the Natural Gas Act). A CLEC contemplating the investment of millions of dollars might well be wary of entrusting its future to tariff terms that are subject to unilateral change by its ILEC rival. The statutory reference to agreements – not tariffs – in sections 251(c)(1) and (c)(3) reflects Congress's understanding of that issue.

Wholly apart from statutory concerns, the FCC determined that a test for evaluating the impact of special access on impairment in individual local markets "would raise insurmountable hurdles regarding administrability." *Order* ¶ 65 (JA). Such a test "would require the Commission to examine all revenues [a CLEC] might hope to capture using the UNE or special access service at issue in a given market … and to compare those potential revenues against every relevant state and federal tariff and every [ILEC] retail and wholesale service offered in every market at issue for every element or service," taking into account all "available term and volume discounts." *Order* ¶ 58 (JA). Adding to the complexity of this endeavor, the prices and terms governing special access vary greatly from market to market – or even from customer to customer in the case of individually negotiated contract tariffs. *Order* ¶ 55 (JA). Considering the multitude of different special access tariffs nationwide, and given the absence of "robust competition" in the local exchange market generally, the Commission sensibly decided that evaluating the effect of special access on impairment in individual local markets "would be excessively complicated" and "utterly impracticable," "requiring resources far beyond those available to this Commission." *Order* ¶ 58 (JA).

In addition, the Commission reasonably found that a rule denying access to UNEs whenever tariffed alternatives are available would create an "unacceptable risk of significant abuse by [ILECs]." *Order* ¶ 59 (JA). Under such a rule, ILECs "could strategically manipulate the price of their direct competitors' wholesale inputs to prevent competition in the downstream retail market" by creating a price squeeze. *Order* ¶ 63 (JA); *see also id.* at n.159 (JA). The Commission found record evidence that the availability of UNEs serves to discipline special access rates by exercising "a constraining influence" on ILECs' ability to increase those rates. *Order* ¶ 65 (JA) (quoting Time Warner Telecom Comments at 15 (JA)). On the basis of that evidence, the Commission found that the "elimination of UNEs would significantly risk increased special access pricing, undermining or destroying the ability to compete using tariffed alternatives." *Ibid.* (JA -). This assessment of the potential for anticompetitive ILEC behavior is entitled to substantial deference: "Predictions regarding the actions of regulated entities are precisely the [types] of policy judgments that courts routinely and quite correctly leave to administrative agencies." *Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1260-61 (D.C. Cir. 2004) (internal quotations omitted); *see also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-96 (1981).

In light of all these factors, the FCC reasonably concluded that CLECs' limited use of special access to provide local service did not conclusively demonstrate a lack of impairment or justify removal of the unbundling requirement in the local exchange market. *Order* ¶¶ 46-65 (JA -). Although they may disagree with the Commission's extensive examination of this issue in the *Order*, the ILECs cannot seriously claim that the Commission "refused to consider" special access. ILEC Br. 18.

Likewise, the ILECs have no basis for arguing that the Commission's treatment of special access "violates this Court's mandate." ILEC Br. 20. The ILECs appear to assume that when the Court directed the FCC to "consider" the role of special access in the impairment inquiry, it mandated a ban on unbundling in any market where a CLEC uses special access. The Court did no such thing. To the contrary, it stated that "on an appropriate record the Commission might find impairment even when services were available from ILECs outside § 251(c)(3)." *USTA II*, 359 F.3d at 577. Furthermore, the Court gave the Commission considerable discretion to decide how to treat special access, allowing the agency "to take into account such factors as administrability, risk of ILEC abuse, and the like." *Ibid.* Only after it had "considered" these and other factors on remand did the Commission reasonably conclude that the availability of special access should not preclude unbundling in the local exchange market.

In an analogous context, this Court has held that a statute directing the FCC to "consider" a factor does *not* require the agency "to give any specific weight" to that factor. *Omnipoint*

Corp. v. FCC, 78 F.3d 620, 634 (D.C. Cir. 1996) (quoting *Time Warner*, 56 F.3d at 175). As long as the FCC reaches "an express and considered conclusion" about "the potential role" of a factor, the agency does not violate a statutory command to "consider" the factor even if it ultimately concludes that the factor "should not be given any weight." *Time Warner,* 56 F.3d at 175. In the same way, the Commission in this case fully satisfied this Court's mandate to "consider" special access when it reached a considered and well-reasoned conclusion concerning the role of special access in the impairment inquiry.

Although the ILECs question each of the Commission's reasons for its treatment of special access, none of their challenges is well founded. The ILECs maintain that statutory considerations cannot support the Commission's approach because the Court in *USTA II* rejected the agency's previous statutory rationale for treating special access as irrelevant to impairment. ILEC Br. 21-22. This argument fails for two reasons. *First*, the Commission on remand focused on statutory concerns that were "not previously considered" by this Court. *Order* ¶ 50 (JA). For instance, the Commission observed that because "the vast majority of special access offerings are purchased pursuant to federal tariffs," a reading of the statute that allowed special access to supplant unbundling would effectively "eliminate the states from any role in implementing local competition under the Act," thereby destroying the "federal-state partnership" that Congress intended to create. *Order* ¶ 53 (JA -) (citing *AT&T,* 525 U.S. at 377-86). Similarly, it would have been pointless for the 1996 Act to establish an unbundling regime if Congress believed that ILECs' special access offerings – which were already pervasive before the Act took effect – would render unbundling unnecessary. *Order* ¶¶ 51-52 (JA -). "Congress cannot be presumed to do a futile thing." *Halverson v. Slater,* 129 F.3d 180, 185 (D.C. Cir. 1997); *see also RCA Global Communications, Inc. v. FCC,* 758 F.2d 722, 733 (D.C.

Cir. 1985) (a statutory interpretation that "would deprive" a provision "of all substantive effect" is "self evidently contrary to Congress' intent").

Second, in contrast to *USTA II,* the Commission here did not base its analysis of special access solely on statutory grounds, and it did not find the availability of special access to be irrelevant. Rather, in considering the effect of special access on the impairment inquiry, the Commission took account of "administrability" concerns and the potential "risk of ILEC abuse" – issues that the Court had expressly authorized the agency to consider when deciding how much weight to give special access in the impairment inquiry. *See USTA II*, 359 F.3d at 577.

The ILECs try to downplay the complications inherent in administering an impairment test that accounts for special access. They make much of the Court's statement that such complications would "recede" in those markets where competitors are already using special access. ILEC Br. 23 (quoting *USTA II*, 359 F.3d at 576). By its own terms, however, the Court's statement was limited to situations where "there is no claim that ILECs would be able drastically to hike [special access] rates." *USTA II,* 359 F.3d at 576. Here, by contrast, the Commission found record evidence that ILECs could raise special access rates substantially – creating a price squeeze – if they were no longer required to offer UNEs as an alternative to special access. *Order* ¶¶ 59-65 (JA -).[13] That prospect raises the very issues that the Court said could even "support a blanket rule" treating special access as irrelevant to impairment: "the ILECs' incentive to set the tariff price as high as possible and the vagaries of determining when that price gets so high that the 'impairment' threshold has been crossed." *USTA II,* 359 F.3d at 576.

[13] *See* Time Warner Telecom Comments at 15 (JA) ("UNEs have unquestionably had a constraining influence on the incumbents' exercise of their power over special access price and service quality") (quoted in *Order* ¶ 65 (JA)).

The ILECs claim that the Commission can sidestep the complexities of a case-by-case analysis of special access by inferring from competitors' entry into one market "the ability of a reasonably efficient competitor to enter another, similar market in an economic manner." ILEC Br. 24 (quoting *Order* ¶ 43 (JA)). This argument incorrectly assumes that the Commission could readily identify "markets with analogous characteristics" concerning special access. *Ibid.* By virtue of their great diversity, special access offerings do not fit neatly into broad categories that allow for general inferences. They vary greatly not only from market to market, but even within markets under individually negotiated contract tariffs. *Order* ¶¶ 55-56 (JA -). Thus, any attempt to determine whether special access would permit economic entry in a particular market would necessarily entail the sort of fact-intensive, market-specific evaluation that the Commission found it could not feasibly perform.

The ILECs also disparage the Commission's concerns about the risk of anticompetitive ILEC behavior. They note that when this Court affirmed the FCC's special access pricing flexibility rules, it accepted the agency's prediction that ILECs were unlikely to adopt exclusionary pricing practices. ILEC Br. 24 (citing *WorldCom, Inc. v. FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001)). Since that time, however, the Court has twice remanded cases to the Commission for further consideration of allegations that ILECs have engaged in price squeezes. *See WorldCom, Inc. v. FCC*, 308 F.3d 1, 9-10 (D.C. Cir. 2002); *Sprint Communications Co. v. FCC*, 274 F.3d 549, 554-56 (D.C. Cir. 2001). Moreover, the Court in *USTA II* expressly authorized the Commission to consider "the risk of ILEC abuse" when evaluating whether special access obviated the need for unbundling. *USTA II*, 359 F.3d at 577. And during this proceeding, the Commission discovered that at least one ILEC's special access tariff discriminated against competitors by favoring the ILEC's own long-distance affiliate. *Order* at n.163 (JA) (citing *AT&T Corp. v. BellSouth Telecommunications, Inc.*, 19 FCC Rcd 23898 (2004)). This evidence confirmed that the risk of ILEC abuse remains very real.

The ILECs contend that the Commission should have addressed its price squeeze concerns by amending its pricing flexibility rules – an approach that the ILECs characterize as a "narrower alternative" to unbundling. ILEC Br. 25 (quoting *USTA II,* 359 F.3d at 571).[14] The problem with the ILECs' proposal is that the pricing flexibility rules and the unbundling rules "are related to different statutory provisions and serve different policy goals." *Order* ¶ 60 (JA); *see also WorldCom,* 238 F.3d at 460 (noting the difference between pricing flexibility and unbundling). If the Commission tried to narrow the scope of unbundling by reducing ILECs' flexibility to set special access prices, the resulting rule change would defeat the basic purpose of pricing flexibility: to "relax restrictions" on ILEC pricing of special access so that FCC regulations "do not unduly interfere with the development and operation of [special access] markets as competition develops." *See Access Charge Reform,* 14 FCC Rcd 14221, 14257 (¶ 67) (1999) (internal quotations omitted), *aff'd, WorldCom, Inc. v. FCC,* 238 F.3d 449. Cast in that light, an overhaul of pricing flexibility rules hardly qualifies as a "narrower alternative" with "fewer disadvantages" than unbundling. *See* ILEC Br. 25 (quoting *USTA II,* 359 F.3d at 571). Indeed, the ILECs would almost surely challenge any FCC rule that imposed new constraints on their ability to set special access rates. The Commission has wide discretion, in any event, to choose a proper course of action to reconcile policies that might channel the behavior of regulated entities in different directions. "[O]nly the Commission may decide how much

[14] As the ILECs point out, the FCC recently commenced a proceeding to re-examine its pricing flexibility rules. *See Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd 1994 (2005).

precedence particular policies will be granted when several are implicated in a single decision." *Melcher v. FCC*, 134 F.3d 1143, 1154 (D.C. Cir. 1998) (internal quotations omitted). "[T]he fact that there are other solutions to a problem is irrelevant provided that the option selected is not irrational." *Association of Public-Safety Communications Officials-International, Inc. v. FCC,* 76 F.3d 395, 400 (D.C. Cir. 1996) ("*APSCO*") (quoting *Loyola University v. FCC,* 670 F.2d 1222, 1227 (D.C. Cir. 1982)).[15]

Finally, the ILECs assert (Br. 26-27) that the Commission should not have analyzed the local exchange market separately from the wireless and long-distance markets because CLECs are using special access to provide packages of local, long-distance, and other services. This argument ignores the Court's precedents. The Court has upheld the Commission's authority to make service-by-service distinctions when defining ILECs' unbundling obligations. *CompTel,* 309 F.3d at 12-14. Furthermore, the Court has held that the Commission may not ignore differences among "specific markets or market categories" when determining the proper scope of mandatory unbundling. *USTA I,* 290 F.3d at 426.

In *USTA II,* the Court itself held that the specific characteristics of the wireless and long-distance markets did not justify a finding of impairment *in those markets. See USTA II,* 359 F.3d at 575-77, 592-93. It made no such finding with respect to the local exchange market. The evidence in this proceeding showed that competitive conditions in the local exchange market are different from those in the wireless and long-distance markets. The Commission properly accounted for those differences in the *Order.* While it denied the use of UNEs solely to provide

[15] *See also Illinois Bell Telephone Co. v. FCC,* 883 F.2d 104, 109 (D.C. Cir. 1989) ("Only if it appears that the Commission has abused its discretion in striking a balance between competing statutory concerns is judicial intervention appropriate.").

service in the competitive wireless and long-distance markets, the Commission reasonably retained unbundling requirements in the local exchange market, where "competition has not evolved without UNEs." *Order* ¶ 38 (JA).

The ILECs incorrectly suggest (Br. 27) that users of special access are competing successfully in local markets. According to the record, those CLECs that the ILECs have touted as successful users of special access in local markets are actually "losing money every quarter." Letter from Jason Oxman, ALTS, to Marlene Dortch, FCC, August 11, 2004, Attachment at 2 (JA). For example, Time Warner Telecom lost money every year from 2001 to 2003; and by October 2004, its stock had plummeted more than 50 percent in just 12 months. AT&T Selwyn Reply Declaration ¶ 37 (JA -). Similarly, US LEC lost money each year from 2000 to 2003, suffering losses of roughly $30 million in 2003 alone. *Id.* ¶ 38 (JA -). The financial woes of these companies refute the ILECs' assumption that carriers using special access generally are competing successfully in local markets.

Given "the absence of widespread competition in the local exchange market" and the "decidedly mixed" record of CLECs relying on special access, the Commission reasonably decided that it lacked sufficient evidence to conclude that local competition by users of special access, "to the extent it exists, is sustainable, enduring competition." *Order* at n.180 (JA). That finding, in tandem with the FCC's substantial concerns about administrability and the risk of ILEC abuse, amply justified the Commission's determination that CLECs' limited use of special access to provide local service should not preclude access to UNEs in local markets.

B. The Commission Reasonably Declined To Prohibit Users Of Special Access From Converting To UNEs.

Once the Commission determined that a CLEC's use of special access does not in itself demonstrate the carrier's lack of impairment, *Order* ¶¶ 64-65 (JA -), it would have made no sense for the agency to prohibit CLECs that use special access from converting to UNEs in markets where other CLEC have access to UNEs. A bar on conversions "would give rise to 'anomalies,'" because CLECs already using special access to provide local service would be banned from obtaining UNEs while all other CLECs, including new entrants, would face no such restriction. *Order* ¶ 231 (JA) (quoting *USTA II*, 359 F.3d at 593). To avoid such anomalies, the Commission reasonably concluded that users of special access should continue to have the same opportunities to purchase UNEs that all other CLECs have.

Administrability concerns also justified the Commission's refusal to bar special access conversions. The Commission explained that in the "dynamic market" for network access, "elimination of UNEs would significantly risk increased special access pricing." *Order* ¶ 65 (JA -). A bar on conversions would likely trigger increases in special access rates in markets across the country, which would in turn compel the Commission to reassess impairment in all of those markets. Given the market-by-market variations in special access rates and the possibility of frequent rate changes on short notice, any such reassessment of impairment would require constant review of special access pricing on a case-by-case basis – "review that would necessitate investigation not only of the applicable tariffed rate but also of the relevant retail rates in the particular jurisdiction in which a particular competitor operates." *Ibid.* (JA). Such a complex, fact-intensive inquiry "would raise insurmountable hurdles regarding administrability." *Ibid.* In addition, enforcement of a ban on conversions would pose intractable "line-drawing and administrative difficulties" of its own, requiring the Commission to resolve numerous disputes over whether "a series of distinct transactions" between a CLEC and an ILEC constituted a prohibited "conversion" or a permissible new order of UNEs. *Order* ¶ 232 (JA).

The Commission rightly rejected the ILECs' assertion that "a tremendous number" of special access conversions would occur if the agency did not repeal its rule authorizing conversions. *Order* ¶ 230 (JA). By denying CLECs the right to use UNEs solely to provide wireless or long-distance service, the Commission's revised unbundling rules have significantly reduced the number of special access circuits that are eligible for conversion. *Ibid.* Even apart from that change, the industry's past experience contradicted the ILECs' prediction of a mass CLEC exodus from special access. Although the FCC first authorized special access conversions several years ago, the ILECs acknowledge that, for whatever reasons, "many CLECs retained special access circuits long after they could have converted them to UNEs." ILEC Motion for Expedition and Limited Stay at 8 n.6; *see also* Verizon Comments at 77 (JA).

The record showed that users of special access often did not convert to UNEs because ILECs took various steps to obstruct conversions (*e.g.,* adding hefty nonrecurring charges to UNE orders, refusing to combine UNEs, and failing to perform routine network modifications to accommodate unbundled access). *See Order* ¶ 64 & nn.181-83, ¶ 231 & n.647 (JA - ,). Given this evidence of past ILEC intransigence, the Commission had good reason for concern that if users of special access lost the ability to convert to UNEs, ILECs might raise their special access rates to levels that precluded competition. To guard against that prospect, the Commission decided to continue authorizing the conversion of special access services to UNEs in eligible markets. This was not simply a matter of allowing CLECs to obtain a "price break," as the ILECs claim (Br. 28). Rather, the agency reasonably found that a ban on conversions, by stripping CLECs of "substantial bargaining power," could induce a sharp increase in ILECs' special access rates, "undermining or destroying" CLECs' "ability to compete using tariffed alternatives." *Order* ¶ 65 (JA -).

The ILECs maintain that the FCC's continuing authorization of conversions violates the Court's mandate in *USTA II*. ILEC Br. 29. But *USTA II* did not require the Commission to refuse to authorize conversions. The Court there held that "the presence of robust competition" enabled by special access precluded unbundling in the wireless and long-distance markets. *USTA II*, 359 U.S. at 575-77, 592-93. The Court did *not* say – or even suggest – that users of special access are competing robustly – or even successfully – in providing local exchange service.

The ILECs seem to think that the use of special access to provide local service *anywhere* warrants the elimination of unbundling requirements for high-capacity facilities *everywhere*. They contend that the Commission should "prohibit *all* carriers from using UNEs where competitors are successfully using tariffed services." ILEC Br. 31 (emphasis in original). But the ILECs' unduly broad notion of what constitutes "successful" competition drains the concept of "success" of any real meaning. According to the ILECs, wherever "a CLEC has won *a customer* in the high-capacity services market using special access, that CLEC plainly can compete without UNEs." ILEC Br. 29 (emphasis added). Simply put, the ILECs maintain that if a single CLEC is using special access to serve just one customer, the provision of service to that solitary customer suffices to establish "successful" competition without UNEs, thus justifying a categorical ban on the unbundling of high-capacity facilities. This extraordinary argument does not remotely resemble anything that the Court said in *USTA II*.

The ILECs' expansive conception of "successful competition" is reminiscent of an argument advanced several years ago by a prominent ILEC. When SBC challenged the FCC's denial of the company's 1997 application to enter the long-distance market in Oklahoma, it argued (among other things) that Brooks Fiber Communications – whose offering of residential phone service in Oklahoma consisted entirely of free test service to four Brooks employees – qualified as a "competing provider" under 47 U.S.C. § 271(c)(1)(A). *SBC Communications Inc. v. FCC*, 138 F.3d 410, 414, 416 (D.C. Cir. 1998). The Court flatly rejected that argument. Concluding that "[t]est service provided to only four employees is hardly a commercial alternative," the Court ruled that the Commission acted reasonably in rejecting SBC's interpretation of the statute. *Id.* at 416. The Court should reach a similar conclusion here. The Commission properly rejected the ILECs' "flawed assumption that any carrier using special access" to serve even one customer is "competing successfully" in the local exchange market. *Order* ¶ 64 (JA). Instead, for all of the reasons set forth in the *Order,* the Commission reasonably decided that CLECs' limited use of special access in local markets should not preclude any CLECs – including current users of special access – from gaining access to UNEs. The Court should uphold that decision.

IV. THE COMMISSION REASONABLY ADOPTED OBJECTIVE, READILY VERIFIABLE PROXIES TO ASSESS HIGH-CAPACITY TRANSPORT AND LOOP IMPAIRMENT AT THE WIRE CENTER LEVEL.

In this proceeding, the parties proposed several alternatives for assessing impairment with respect to high-capacity transport and loops. Parties advocated tests at several geographic levels, including nationwide, within MSAs, within wire centers, and on a building-by-building basis. After considering the merits of each proposal, the Commission decided to evaluate high-capacity transport and loop impairment at the wire center level. *See Order* ¶¶ 82, 86, 155-165 (JA , , -). Heeding this Court's *USTA* decisions, the Commission concluded that nationwide and

MSA-wide tests were too broad and failed to account for significant variations in market conditions within those areas. *Order* ¶¶ 82, 155, 164-165 (JA , , -). *See, e.g.*, *USTA II*, 359 F.3d at 570. At the other extreme, the Commission found that a building-by-building approach would not be administrable and would invite endless litigation. *Order* ¶¶ 157-160 (JA -). The Commission reasonably concluded that analyzing impairment at the wire center level would be sufficiently nuanced to account for market variations, but not so fact-intensive that it would be too difficult to administer. *Order* ¶¶ 80, 82, 155, 161 (JA , , ,). The wire center approach chosen by the Commission also would account for both actual and potential competitive deployment, in accordance with *USTA II*. *Order* ¶¶ 79, 82, 88, 156 (JA , , ,). *See USTA II*, 359 F.3d at 575.

The Commission determined that business line density and fiber-based collocation are the best indicators of actual and potential competitive deployment within wire centers because they reflect revenue potential. *Order* ¶¶ 93, 95, 167-168 (JA , , -). Fiber-based collocation "very clearly indicates the presence of competitive transport facilities in that wire center and signals that significant revenues are available from customers served by that wire center." *Order* ¶ 96 (JA). The Commission pointed out that this Court had approved the use of fiber-based collocation as a proxy to measure market conditions in circumstances where a regulatory policy turned on the feasibility of competitive entry. *Ibid.; see WorldCom*, 238 F.3d at 458-60. Business line density is a useful predictor of competitive deployment because "transport deployment largely has been driven by the high bandwidth and service demands of businesses, particularly in areas where business locations are highly concentrated." *Order* ¶ 103 (JA). The Commission reasonably found that fiber-based collocation and business line counts are readily available, objective measures of actual and potential competitive deployment. *Order*

¶¶ 100, 105, 161 (JA , ,). The Commission applied numeric impairment tests to those proxies as a means of identifying wire centers in which ILECs would be required to unbundle high-capacity transport and loops.

High-Capacity Transport. The Commission divided wire centers into three categories for purposes of assessing high-capacity transport impairment. "Tier 1" wire centers have at least 38,000 business lines *or* four fiber-based collocators. *Order* ¶ 112 (JA). These thresholds "signify that very extensive [CLEC] transport deployment exists, or is likely to exist." *Ibid.* The Commission found that two-thirds of wire centers with 38,000 business lines have at least four fiber-based collocators, and that Tier 1 wire centers account for 34.2 percent of all business lines served out of BOC wire centers. *Order* ¶¶ 114-115 (JA -). Setting the collocation threshold at four "provides a very reasonable assurance that at least one (and likely more than one) of the four carriers fiber-collocated at each [wire center] has a network capable of connecting those two points, or could build such networks." *Order* ¶ 113 (JA).

"Tier 2" wire centers have at least 24,000 business lines *or* three fiber-based collocators. *Order* ¶ 118 (JA). These wire centers have "a very substantial concentration of both competitive deployment and demand characteristics." *Order* ¶ 119 (JA). Tier 2 wire centers serve 12.6 percent of all BOC business lines. *Order* ¶ 119 (JA). Two-thirds of wire centers with 24,000 business lines have at least three fiber-based collocators. *Order* ¶ 118 (JA).

The Commission classified all remaining wire centers as "Tier 3" wire centers. *Order* ¶ 123 (JA). "These offices are characterized by very low potential revenues, as indicated by two or fewer fiber-based collocators *and* a low number of business lines." *Ibid.*

The Commission reasonably determined that requesting carriers are impaired without unbundled access to DS1 transport "on all routes except those connecting two Tier 1 wire centers." *Order* ¶ 126 (JA). Although competing carriers generally cannot self-provide DS1 transport, *ibid.*, the Commission found that "alternative wholesale transport opportunities at the DS1 level are likely to exist or develop" between two Tier 1 wire centers. *Order* ¶ 127 (JA).

For DS3 transport, the Commission found that competing carriers are impaired on all routes for which at least one end point is a Tier 3 wire center. Stated another way, "requesting carriers are not impaired without access to unbundled DS3 transport on routes connecting … Tier 1 or Tier 2 wire centers." *Order* ¶ 129 (JA). The Commission reasonably found that the "significant revenue opportunities at both ends of such routes make it highly likely that competing carriers have deployed or can deploy in an economic manner transport to link such wire centers." *Order* ¶ 130 (JA).

High-Capacity Loops. The record below indicated that the highest concentration of competitive loop deployment occurs in the central business districts of large metropolitan areas "near where competitors have already deployed fiber rings." *Order* ¶ 154 (JA). Accordingly, the Commission specifically designed its loop impairment tests to capture "areas characterized by high revenue opportunities *and* the likely presence of multiple competitive fiber rings." *Order* ¶ 168 (JA) (emphasis added). That is why the agency's "test for high-capacity loops requires both a minimum number of business lines served by a wire center *and* the presence of a minimum number of fiber-based collocators to show that requesting carriers are not impaired." *Ibid.* (emphasis in original).

For DS1 loops, the Commission eliminated unbundling in wire centers that have at least 60,000 business lines *and* four fiber-based collocators. *Order* ¶ 178 (JA). The Commission recognized that "stand-alone DS1 loops offer low revenue opportunities and are thus unlikely to be deployed competitively." *Ibid.* Nevertheless, the Commission reasonably found that DS3 or higher-capacity loops "are likely to be widely deployed already" within those wire centers, so competitors can offer "channelized" DS1 service to smaller customers over the same loop. *Ibid.* The Commission also found a "likelihood that [CLECs] will offer excess capacity on a wholesale basis" within those wire centers. *Order* ¶ 180 (JA). Wire centers meeting the DS1 test average "over 91,000 business lines each" and offer "particularly high revenue opportunities." *Ibid.* These wire centers account for approximately 8 percent of all BOC business lines. *Order* ¶ 179 (JA).

The Commission eliminated unbundling for DS3 loops "in any building served by a wire center with at least 38,000 business lines *and* four fiber-based collocators." *Order* ¶ 174 (JA) (emphasis added). The Commission reasonably found that these thresholds "indicate fiber deployment and revenue opportunities sufficient to render competitive deployment of DS3 loops economic." *Ibid.* (JA). The record indicated that "competitors are likely to have deployed extensive fiber in such wire centers' service areas, resulting in more splice points located throughout the wire center serving area and therefore shorter distances between buildings within that service area and splice points on" fiber optic rings. *Ibid.* Wire centers meeting the DS3 test "serve, on average, over 65,000 business lines each, and 75 percent of them serve at least 46,000 business lines, indicating high revenue opportunities." *Order* ¶ 175 (JA). The DS3 test eliminated unbundling in wire centers that account for approximately 14 percent of BOC business lines. *Order* at n.477 (JA).

Both the ILECs and the CLECs attack the FCC's impairment tests for high-capacity facilities. The ILECs contend that those tests require unbundling in markets where CLECs are *not* impaired. ILEC Br. 31-43. In contrast, the CLECs maintain that the tests eliminate unbundling in markets where CLECs *are* impaired. CLEC Br. 7-27. As we explain below, neither the incumbents nor their competitors have given the Court any good reason to disturb the Commission's impairment tests for high-capacity loops and transport.

A. The ILECs' Arguments Do Not Justify A Remand.

The ILECs raise two arguments concerning high-capacity transport and loops. First, they contend that the fiber-based collocation and business line density thresholds the Commission established for unbundling relief are too high. The ILECs do not challenge the Commission's rejection of the tests they proposed below, nor do they suggest where the lines should have been drawn. They merely argue that the Commission should have adopted lower business line and fiber-based collocation cutoffs. *See* ILEC Br. 31-34. Second, the ILECs claim that the Commission failed to accord sufficient weight to maps and other evidence they submitted – evidence that does not correlate to the wire center tests the Commission adopted. The ILECs do not challenge the Commission's decision to adopt wire center tests, which are based on objective, readily available data. Indeed, the ILECs supported a wire center test for loop unbundling. Nonetheless, they claim that the Commission should have given their evidence more weight and drawn negative inferences against CLECs for failing to produce more evidence concerning competitive deployment. ILEC Br. 35-42. Neither argument warrants a remand.

(1) The ILECs Have Not Shown That The Unbundling Lines The Commission Drew Are Unreasonable.

The ILECs contend that the Commission should have adopted lower business line and fiber-based collocation cutoffs for unbundling high-capacity transport and loops. ILEC Br. 31-34. The ILECs bear a heavy burden in making this argument. The Commission has "wide discretion to determine where to draw administrative lines." *AT&T*, 220 F.3d at 627. Moreover, the Court in *USTA II* recognized "the inevitability of *some* over- and under-inclusiveness in the

Commission's unbundling rules." *USTA II*, 359 F.3d at 570 (emphasis in original). This Court has been "generally unwilling to review line-drawing by the Commission unless a petitioner can demonstrate that lines drawn … are patently unreasonable, having no relationship to the underlying regulatory problem." *NASUCA v. FCC*, 372 F.3d 454, 461 (D.C. Cir. 2004); *WorldCom*, 238 F.3d at 462; *Cassell*, 154 F.3d at 485; *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 60 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). The ILECs have not met their burden.

High-Capacity Loops. The ILECs' arguments with respect to high-capacity loops beg the question on review. In their brief, the ILECs address only the market conditions in wire centers where the Commission *eliminated* unbundling. *See* ILEC Br. 32. The ILECs say absolutely nothing about market conditions in wire centers where the Commission *required* unbundling, which are the relevant markets for purposes of their challenge to the *Order*. The ILECs contend in effect that, because the average wire center where the Commission eliminated unbundling is competitive, the Court should infer that some of the wire centers where unbundling is still required are also competitive. *Ibid.* The ILECs offer nothing to support that inference. For example, their brief does not say a word about the average number of collocators in wire centers where the Commission requires unbundling. As a result, the ILECs' brief does not provide this Court any basis to assess whether the lines the Commission drew are "patently unreasonable." *See NASUCA*, 372 F.3d at 461.

The ILECs compound their omission by failing to contest the Commission's rationale for rejecting the lower unbundling cutoffs they proposed, which were based solely on business line counts in wire centers. The Commission rejected those proposals "because sufficient collocation in a wire center is essential to show that the buildings in the wire center service area are likely within reasonable proximity to alternative fiber networks." *Order* ¶ 190 (JA). The

Commission also concluded that the ILECs' proposed line counts "are too low to indicate sufficient revenues to justify deployment." *Ibid.* For example, the Commission noted that wire centers satisfying BellSouth's proposed 5,000-line test for DS3 loops would, on average, have "fewer than 2 fiber-based collocators …, and almost 40 percent would have none at all." *Order* ¶ 191 (JA). The ILECs do not discuss, let alone contest, these findings in their brief.

These omissions are fatal to the ILECs' case. Arguments omitted from a petitioner's opening brief are not properly before the court and are deemed waived. *Verizon Telephone Cos. v. FCC*, 292 F.3d 903, 911-12 (D.C. Cir. 2002); *Echostar Communications Corp. v. FCC*, 292 F.3d 749, 754 (D.C. Cir. 2002); *General Instrument Corp. v. FCC*, 213 F.3d 724, 732 (D.C. Cir. 2000). The arguments that the ILECs *do* present understate the significance of the unbundling relief that the Commission granted. The ILECs claim that the Commission eliminated unbundling in only 0.5 percent of all wire centers for DS1 loops and 1 percent of all wire centers for DS3 loops. ILEC Br. 32. Elsewhere in their brief, however, the ILECs acknowledge that "demand for high- capacity services is highly concentrated," and that "nearly 80% of the demand for [Verizon's] high-capacity special access services … is concentrated in approximately 8% of the wire centers where special access is provided." *Id.* at 11. The percentage of *all* wire centers in which the ILECs obtained relief thus is not meaningful, and it should come as no surprise that the Commission eliminated unbundling in only the small percentage of wire centers in which the demand justified such action. The Commission discussed the pertinent figures in the *Order*. For example, the Commission noted that it eliminated DS3 unbundling "in wire centers accounting for 14% of BOC business lines." *Order* at n.477 (JA); *see also id.* ¶ 179 (JA). The ILECs do not address these figures.

To support their alleged showing of competitive market conditions, the ILECs cite the average number of collocators in wire centers in which unbundling is no longer required. ILEC Br. 32. Besides being irrelevant, those figures are just that: averages. The Commission did not adopt a rule that requires unbundling unless there are 13 competitors with collocations. The Commission eliminated unbundling in wire centers with as few as four fiber-based collocators. The ILECs do not explain why that cutoff is too high.

Finally, the ILECs argue that the Commission's loop tests do not adequately account for potential competition in wire centers that do not now meet the test. ILEC Br. 32. This argument is undermined by the fact that the ILECs themselves advocated a wire center test. *See, e.g.*, *Order* ¶¶ 155, 159, 190-191 (JA , , -). More to the point, the Commission's wire center tests for loops are based entirely on inferences concerning competitive loop deployment: The actual number of competitive DS1 or DS3 loops in service is not a factor. As the Commission explained, "high business line counts and the presence of fiber-based collocators, when evaluated in conjunction with one another, are likely to correspond with actual self-deployment of [CLEC] loops or to indicate where deployment would be economic and *potential* deployment likely." *Order* ¶ 167 (JA) (emphasis added). The ILECs' brief ignores this explanation.

At least one of the ILECs, in a pleading filed with the Commission on reconsideration of the *Order*, has acknowledged that the Commission in its high-capacity facility tests adopted its business line counts precisely "to draw inferences 'from one market regarding the prospects for competitive entry in another.'" Response of SBC to Petitions for Clarification and/or Reconsideration, June 6, 2005, at 19 (quoting *Order* ¶ 43 (JA)). SBC thus recognized that the Commission's test sought to identify not just the routes on which extensive competition already existed, but also the routes on which competition was possible. Responding to arguments by

CLEC parties who challenged the FCC's line counts, SBC quoted with approval the Commission's statement that its aim in relying on business line counts "was to 'abstract[] the economic characteristics of individual [ILEC] wire centers' where competitors *have* deployed their own facilities, to determine wire centers 'where competitive deployment is economic.'" *Ibid.* (quoting *Order* ¶ 90 (JA)). SBC concluded that the CLECs had "provide[d] no reason why the Commission should undertake" the "time-consuming" and "pointless" exercise of collecting new data, performing a new impairment analysis, and establishing new wire center criteria. *Id.* at 20. Although SBC also asserted that the Commission's tests understated the extent of competition, *id.* at 22, its basic position was that the tests were intended to and did draw inferences about potential competition from statistics in markets where actual competition existed. The argument the ILECs make now in this Court is both inconsistent with SBC's position before the Commission and unavailing on review.

High-Capacity Transport. The ILECs' arguments concerning high-capacity transport suffer from many of the same shortcomings as their arguments about loops. The ILECs' brief focuses on the level of competition in wire centers where unbundling is no longer required. *See* ILEC Br. 33. As noted above, that sheds no light on whether the Commission reasonably required unbundling in other wire centers.

The ILECs do cite figures concerning the number of fiber-based collocations in wire centers with more than 5,000 business lines. ILEC Br. 33. But the Commission specifically rejected that proposed threshold, and the ILECs do not address the Commission's rationale. *See* *Order* ¶ 120 (JA). The Commission found that, of the wire centers with more than 5,000 business lines but less than 24,000 (the baseline for Tier 2 status), only 31 percent have two or more fiber-based collocators, and only 56 percent have one or more collocators. *Order* at n.344

(JA). The Commission did not draw a patently unreasonable line when it required unbundling in those wire centers, since 44 percent have *no* fiber-based collocation at all and 69 percent have no more than a single collocator. *Ibid.* The ILECs have offered no basis for this Court to conclude otherwise. *See NASUCA v. FCC*, 372 F.3d at 461.

The ILECs ignore the Commission's explanation of how its tests account for potential facilities deployment, in accordance with *USTA II*, 359 F.3d at 575. The Commission specifically found that fiber-based collocation and business line density "constitute proxies for where sufficient revenue opportunities exist to justify the high fixed and sunk costs of transport deployment," and that "applying these measures in a disjunctive tandem will better capture actual *and potential* deployment than any single measure." *Order* ¶¶ 93-94 (JA -) (emphasis added). The record demonstrates that the Commission accounted for potential competition: The Commission eliminated unbundling in wire centers with sufficient business line counts even if those wire centers had no fiber-based collocations (*i.e.*, no evidence of actual facilities-based competition). *Order* ¶¶ 115, 119 (JA ,). The ILECs do not contest the Commission's reasoning.

Finally, the ILECs point out that the Commission in the AT&T non-dominance proceeding had "declared the long-distance market competitive even when it had only an incumbent and three competing facilities-based providers." ILEC Br. 33-34. In that proceeding, the Commission also found that from 1984 to 1994, "AT&T's market share, in terms of both revenues and minutes, fell from approximately 90 percent to 55.2 and 58.6 percent … respectively." *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3307 (1995). The Commission noted that "AT&T has not controlled local bottleneck facilities for over ten years" and that AT&T faced intense competition from three competitors with nationwide facilities. *Id.* at 3308. The ILECs did not adduce similar evidence in this proceeding.

The ILECs' brief utterly fails to meet their burden of showing that the Commission's high-capacity loop and transport tests are "patently unreasonable." *See NASUCA v. FCC*, 372 F.3d at 461.[16]

(2) The Commission Reasonably Based Its Unbundling Tests On Objective, Readily Available Data, Rather Than Drawing Negative Inferences From Evidence Unrelated To An Administrable Test.

The ILECs argue that the Commission should have granted more unbundling relief on the basis of evidence they submitted in the record, and should have drawn negative inferences against CLECs for failing to adduce more evidence on competitive deployment. ILEC Br. 36-42. These arguments are deeply flawed.

First, the ILECs' brief does not challenge the Commission's decision to assess high-capacity loop and transport impairment on the basis of evidence of actual and potential competition at the wire center level. *See, e.g., Order* ¶¶ 88, 93, 155-156, 161, 167-168 (JA , , - , , -). Indeed, as noted earlier, the ILECs supported a wire center test for high-capacity loops. *Order* ¶¶ 155, 159, 190-191 (JA , , -). The ILECs do not contest the Commission's decision to employ business line density and fiber-based collocation as proxies for measuring actual and potential competition. *Order* ¶¶ 96-106, 167-168 (JA - , -). The ILECs likewise do not challenge the Commission's rejection of other proposed tests, such as an

[16] Although the heading in their brief generically refers to high-capacity facilities, *see* ILEC Br. 31, the ILECs do not specifically challenge the Commission's impairment findings for dark fiber transport. *See Order* ¶¶ 133-135 (JA -). As a result, any arguments they could have made have been waived. *See Verizon*, 292 F.3d at 911-12.

MSA-wide test. *Order* ¶¶ 82-84, 157-165, 186-194 (JA - , - , -). Having failed to address those decisions in their brief, the ILECs have waived any objections they may have. *See Verizon*, 292 F.3d at 911-12.

These omissions are important because the evidence on which the ILECs base their challenge does not correlate to a wire center test. The maps the ILECs submitted show facility deployments over entire MSAs, rather than on a wire center basis. *See* ILEC Br. 38. The Commission rejected an MSA-wide impairment test because "a single MSA can encompass urban, suburban, and rural areas…. An impairment determination that applies to a geographic zone of this size is therefore likely to either over-estimate or under-estimate impairment." *Order* ¶ 164 (JA); *see also id.* ¶¶ 155, 189 (JA ,). The ILECs "offered no administrable and accurate means by which [the Commission] could use the maps to locate those specific areas within an MSA in which we should prohibit unbundling." *Order* at n.445 (JA).[17] The ILECs' brief does not address those findings.

Second, the Commission's wire center tests are based on "objective and readily available" evidence, so a negative inference against the CLECs for failing to produce their own maps of competitive deployment is neither necessary nor appropriate. *See Order* ¶ 161 (JA). The ILECs and CLECs agreed that "fiber-based collocation data are relatively simple to identify and collect." *Order* ¶ 99 (JA). Business line counts "are an objective set of data that [ILECs] already have created for other regulatory purposes." *Order* ¶ 105 (JA). The ILECs do not explain why the Commission should, or how it could, incorporate a negative inference against CLECs into these objective measures.

[17] *See also Order* ¶ 189 (JA) (the ILECs "have provided no evidence in our record linking those maps to administrable tests allowing for a sufficient degree of geographic nuance").

The criticism of the Commission's failure to require CLECs to adduce more evidence is incongruous because the ILECs argued below that the Commission's impairment tests should *not* rely on evidence from CLECs. For example, Verizon argued that "any impairment test should turn on objective, easily verifiable information, not information that is exclusively within the possession of CLECs."[18] SBC contended that the Commission could not trust evidence from CLECs because they "resort to all manner of artifice."[19] The Commission gave the ILECs what they requested: impairment tests based on objective evidence.

Third, although the ILECs assert that "[i]t would be difficult to overstate the detail and quality of evidence" they submitted, ILEC Br. 35, they managed to do so in their brief. For example, the ILECs assert that:

- CLECs have "324,000 route miles of fiber in the business centers where demand for high-capacity facilities is concentrated." ILEC Br. 36. That figure includes long-haul miles.[20] The actual number of local route miles, according to the ILECs, is 62,042.[21]

- "CLECs have access to at least *half a million* buildings on their fiber networks." ILEC Br. 37. That figure includes special access via the ILECs' bottleneck facilities. *Ibid.* According to the ILECs, CLECs own high capacity connections to approximately 32,000 buildings.[22]

- "[T]here are now an average of *19* competitive networks in the top 50 MSAs." ILEC Br. 36. The document cited for support, which the ILECs drafted, does not define "network." The ILECs claim only that services provided over these networks "appear to involve the use of a CLEC's own

[18] Letter from Susanne Guyer and Michael Glover, Verizon, to Michael Powell, FCC, Dec. 8, 2004, at 3 (JA).

[19] Letter from Gary Phillips, SBC, to Marlene Dortch, FCC, Dec. 8, 2004, at 3 (JA).

[20] *See* UNE Fact Report 2004 at I-2, Table 1 (JA).

[21] *See* UNE Fact Report 2004 at III-4, Table 1 (JA).

[22] *See* UNE Fact Report 2004 at I-2, Table 1, & at III-4, Table 1 (JA ,).

facilities."[23] The document does not identify the capacity of the networks. Moreover, in some MSAs, "the number of … networks exceeds the number of CLECs operating within those MSAs" because the ILECs counted facilities owned by one CLEC as more than one network.[24]

- Time Warner Telecom's fiber network "may connect to *more* buildings than BOC fiber" in some markets. ILEC Br. 38. For support, the ILECs quote a source who admits, "I don't know." *Id.* at n.44.

- "CLECs serve more than 25% of local business lines." ILEC Br. 42. The report the ILECs cite indicates that CLECs own only 23.4 percent of those lines. Mathematically, .234 x .25 = .0585. In other words, CLECs serve roughly 6 percent of local business lines over their own facilities.[25]

The Commission generally concluded that the data submitted by the ILECs "are not complete, not representative of the entire industry, not readily confirmable, and aggregated at too high a level to be informative of local market conditions." *Order* ¶ 110 (JA). The ILECs' brief does not address these shortcomings.

Fourth, the Commission found that the ILECs' maps do not show the capacity of service offered or indicate whether the fiber depicted is being used "to provide local service or merely interoffice transport, long-distance service, wireless service, or some combination of services other than local exchange service." *Order* ¶ 188 (JA). As a result, the maps do "not speak directly to our impairment inquiry," which focuses on the economics of deploying facilities for local exchange service or exchange access. *Ibid.* The ILECs suggest that owners of competitive facilities "do offer local services." ILEC Br. 42. That may be true in the abstract, but it is impossible to determine by looking at the ILEC maps whether the facilities shown are being used

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[23] *See* UNE Fact Report 2004 at Appendix D (JA).

[24] *Ibid.*

[25] *See* Wireline Competition Bureau, Industry Analysis & Technology Division, *Local Telephone Competition: Status as of June 30, 2004*, Table 2 (Dec. 2004).

for local services, or if there is available capacity to provide such services. *See Order* ¶¶ 187-188 (JA -); *see also id.* at n.445 (JA).

The Commission concluded that the ILEC maps were especially unhelpful in assessing impairment for high-capacity loops. It found that CLECs face substantial barriers to competitive entry when deciding whether to deploy high-capacity loops, including high sunk costs and uncertain return on investment. *See Order* ¶¶ 150-153 (JA -). The Commission determined that the costs of deployment depend, in part, on the distance between the building to be served and the splice point on the fiber ring to which the loop would be connected. *Order* ¶ 187 (JA). The ILEC maps "do not indicate the placement of the splice points, rendering evaluation of such costs impossible." *Ibid.*

The ILECs respond that those issues are not relevant "to the many thousands of buildings *already* connected to competitors' fiber rings." ILEC Br. 41. This argument is remarkable because the ILECs vigorously opposed a building-by-building assessment of impairment, which they characterized as "a mind-boggling task."[26] *See Order* ¶¶ 158-159 & nn.444, 447 (JA -). Having successfully opposed a building-by-building test, and having submitted maps that do not show the location of competitive loops in wire centers, the ILECs are in no position to claim that the Commission erred by ignoring evidence of actual competitive deployment.[27]

[26] Letter from Gary Phillips, SBC, to Marlene Dortch, FCC, Dec. 8, 2004, at 1 (JA).

[27] The ILECs also suggest that the length of a fiber lateral to a building does not substantially increase the cost of deploying a high-capacity loop because "CLECs can and do utilize existing conduits." ILEC Br. 42. The Commission took the availability of conduit into account. It assumed that "existing conduit is available to competitive carriers that seek to deploy their own loop facilities." *Order* at n.419 (JA). Nonetheless, the Commission specifically found that the costs of construction "can and do vary based on the length of the loop." *Ibid.*

B. The CLECs' Arguments Do Not Justify A Remand.

The CLECS challenge two aspects of the Commission's findings with regard to high-capacity loops. First, they argue that the Commission should have found nationwide impairment for DS1 loops. CLEC Br. 7-13. Second, they contend that the Commission should have applied a building-by-building impairment test for DS1 loops. CLEC Br. 13-25.[28] These arguments amount to a claim that the Commission made the wrong policy choice in deciding to adopt wire center tests for impairment. Because the Commission carefully considered the various impairment tests proposed by the parties, evaluated the strengths and weaknesses of each, and made a reasonable judgment about which test to adopt, the Court should defer to the Commission's ultimate choice of a wire center test.

With respect to transport, the CLECs argue that the Commission should have required DS1 transport unbundling nationwide. They challenge the Commission's decision to eliminate DS1 unbundling on routes connecting two Tier 1 wire centers. CLEC Br. 26-27.[29] The Commission properly rejected the proposed national impairment finding because the record indicated that markets vary significantly, so a national impairment finding would not be appropriate. The Commission reasonably concluded that evidence of actual and potential competition justified eliminating unbundling in certain wire centers.

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[28] The CLECs do not contest the Commission's impairment findings for dark fiber loops. They purport to challenge the Commission's DS3 loop findings in a sentence in a footnote (Br. 13 n.8), but that does not suffice to preserve their argument. *See Building Owners & Mgrs. Ass'n Intl. v. FCC*, 254 F.3d 89, 100 n.14 (D.C. Cir. 2001) (declining to address issue raised in a cursory footnote); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (issue waived on appeal when the opening brief "refers to [an] argument" but does not "actually argue the point").

[29] The CLECs do not object to the Commission's impairment findings with respect to DS3 or dark fiber transport.

(1) The Commission Reasonably Declined To Find Nationwide Impairment For DS1 Loops.

The Commission eliminated DS1 unbundling in "a select group" of wire centers that are "characterized by the most competitive deployment and the greatest revenue opportunities." *Order* ¶ 179 (JA). Nevertheless, the CLECs contend that the Commission should have found nationwide impairment for DS1 loops. CLEC Br. 12. This Court "made clear in *USTA I* that the Commission cannot proceed by very broad national categories where there is evidence that markets vary decisively (by reference to its impairment criteria), at least not without exploring the possibility of more nuanced alternatives." *USTA II*, 359 F.3d at 570 (citing *USTA I*, 290 F.3d at 425-26). The Commission followed that directive on remand. It rejected a national impairment finding, *Order* ¶ 165 (JA), and adopted a more nuanced alternative. The Commission found that, in wire centers with 60,000 or more business lines and four or more fiber-based collocators, competitors "often can offer DS1-capacity service over existing fiber-optic facilities in place" and thus are not impaired without UNEs. *Order* ¶ 178 (JA). That finding is not arbitrary, capricious, or otherwise contrary to law.

The CLECs seek to build their case for a national impairment finding through a series of steps, none of which justifies a finding that the Commission abused its discretion. The CLECs begin by arguing that it is not economic for them to deploy stand-alone DS1 loops. CLEC Br. 7-10. The Commission agreed with the CLECs on that point, finding that "DS1 loops offer low revenue opportunities and are thus unlikely to be deployed competitively." *Order* ¶ 178 (JA). The Commission found no impairment, however, in wire centers with a very high likelihood of competitive deployment of DS3 or higher-capacity loops to buildings. The Commission concluded that in those wire centers, competitors could offer "channelized" DS1 service to customers within the buildings. *Order* ¶¶ 178, 180 (JA ,). The Commission did not rely on CLECs' ability to deploy stand-alone DS1 loops.

Next, the CLECs complain that the Commission, in assessing impairment, refused to consider individual building access constraints, such as difficulties associated with reaching a customer on certain floors of a building. CLEC Br. 10-12. In other words, the CLECs contend that the Commission should assess impairment not only on a building-by-building basis, but also on a floor-by-floor basis. The Commission rejected the proposed building-by-building test as "impracticable and unadministrable." *Order* ¶ 157 (JA); *see also id.* ¶ 162 (JA). It goes without saying that a test that requires consideration of conditions within buildings poses even greater administrability problems. The Commission properly considered "ease of administration and enforceability … in setting its standard for regulatory relief." *WorldCom,* 238 F.3d at 459. *See also USTA II*, 359 F.3d at 577 (FCC is "free to take into account such factors as administrability").

The Commission also found that inquiries into alleged impediments to serving parts of a building would invite "expensive, fact-intensive litigation for years to come." *Order* ¶ 159 (JA). The CLECs do not address that finding.[30] The Commission properly considered "the avoidance of litigation-related delay" in making its decision. *Omnipoint*, 78 F.3d at 633. *See also Florida Cellular Mobil Communications Corp. v. FCC*, 28 F.3d 191, 196-98 (D.C. Cir. 1994), *cert. denied*, 514 U.S. 1016 (1995); *Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413, 1435-37 (D.C. Cir. 1983).

[30] The CLECs also do not address the Commission's finding that, even if there are constraints within a building, CLECs "might be able to serve customers' needs by combining other elements that remain available as UNEs." *Order* at n.454 (JA).

The CLECs finally suggest that the limit the Commission set for unbundled DS1 loops to a single building, *Order* ¶ 181 (JA), establishes the line at which "loop duplication becomes economically feasible." *See* CLEC Br. 13. This argument mixes apples and oranges. The limit on unbundled loops relates to wire centers where unbundling is *required*. The limit restricts a CLEC to less than 10 unbundled DS1 loops, on the theory that a CLEC with sufficient demand for that many DS1s would "find it economic to purchase a single DS3 loop." *Order* ¶ 181 (JA). The limit has nothing to do with the wire centers where unbundling was eliminated. The Commission identified the latter wire centers on the basis of "a high likelihood of fiber deployment at the *DS3 or higher* capacity," from which it inferred "that deployment of facilities to serve *DS1* customers using channelized higher-capacity facilities would be economic." *Order* ¶ 178 (JA) (emphasis in original). While the CLECs may quarrel with that decision, it is not the Court's "role to second-guess the FCC's policy judgment, so long as it comports with established standards of administrative practice." *WorldCom*, 238 F.3d at 458.

(2) The Commission Reasonably Adopted A Wire Center Test For DS1 Loop Impairment After Considering And Rejecting Alternative Proposals.

The CLECs argue that the Commission should have adopted a building-by-building impairment test for DS1 and DS3 loops instead of a wire center test. CLEC Br. 13-25. "[T]he fact that there are other solutions to a problem is irrelevant provided that the option selected is not irrational." *APSCO*, 76 F.3d at 400 (internal quotations omitted). "The FCC need not demonstrate that it has made the *only* acceptable decision, but rather that it has based its decision on a reasoned analysis supported by the evidence before the Commission." *Id.* at 398. "[I]f the agency has offered a reasoned explanation for its choice between competing approaches supported by the record, the court is not free to substitute its judgment for that of the agency." *Ibid.*

The FCC in this case *did* clearly address the alternatives that had been raised by commenting parties. The Commission acknowledged that "[p]arties have advocated a wide array of options, ranging from building-specific tests to MSA-wide determinations to national findings of impairment or lack thereof. We recognize that some imperfections are inherent in any approach we might adopt, and conclude that the other proposed geographic tests have greater defects than the one we select." *Order* ¶ 155 (JA). The Commission reasonably concluded that the CLECs' proposed building-by-building test would not be administrable, would result in endless litigation, and would not properly account for potential competitive deployment. *Order* ¶¶ 157-163 (JA -).

The CLECs offer few responses to those findings. They suggest that a building-by-building review would be limited because the "number of buildings to which competitive carriers have deployed high capacity loops … is minimal." CLEC Br. 24. This argument ignores the Court's prior holding that the Commission also must consider *potential* competitive deployment. *See USTA II*, 359 F.3d at 575. The Commission correctly concluded that, if it adopted a building-by-building test, it would be required to assess not only buildings where CLECs have deployed loops, but also comparable buildings where competitive deployment is possible. *Order* ¶ 160 (JA). The CLECs suggest that the Commission could have accounted for potential competition by assessing the revenue potential of each building. CLEC Br. 25. But that "would render the building-specific test even more fact-intensive, and far more difficult to administer." *Order* ¶ 160 (JA). The CLECs' proposal would have required the Commission to assess competitive deployment and potential deployment at thousands and thousands of buildings.

In addition, the CLECs wanted the Commission to consider potential obstacles to serving particular customers *within* each building. The Commission reasonably concluded that the CLECs' proposal was impractical and invited years of contentious litigation. *Order* ¶ 159 (JA). The CLECs claim (Br. 24-25) that the Commission could have enlisted state agencies as fact finders, but that would have resulted in precisely what the Commission opted to avoid – interminable disputes at the state and federal levels about whether it is economic for competitors to serve a particular building. The Commission properly considered that factor in making its decision. *See Omnipoint*, 78 F.3d at 633.

The Commission chose a wire center test because it is based on readily available objective evidence, is easier to administer than the alternatives, and avoids prolonged litigation. *Order* ¶ 161 (JA). The CLECs' criticisms of the wire center tests for DS1 and DS3 loops amount to a difference in policy preferences. Although this is "not a sufficient basis upon which to upset the FCC's determination," *WorldCom*, 238 F.3d at 461, we will briefly address those criticisms.

1. The CLECs assert that the revenue potential within a wire center, as reflected by a high concentration of business lines and fiber-based collocation, is not probative of the ability to deploy a loop to a particular building. CLEC Br. 16. The Commission, however, found that its wire center test linked impairment "to the factor that most prominently determines whether construction of a competitive facility is economic – namely, the presence of extensive fiber rings within an area." *Order* ¶ 161 (JA). The CLECs themselves adduced evidence that "when they build fiber rings in a metropolitan area, they do so in a manner that identifies geographically proximate commercial buildings that house as many potential customers as possible, and attempt to design and build the ring such that it directly passes and can be used to serve as many of those buildings as possible." *Order* ¶ 154 (JA). As a result, "carriers are able to self-deploy or to use competitive DS3 loop facilities in large metropolitan areas where buildings are either directly connected to a competitive fiber ring, or likely would require the construction of only a short lateral from a nearby splice point." *Ibid.* The Commission reasonably relied on that evidence in choosing to apply a wire center evaluation and in formulating its specific wire center tests.

2. The CLECs contend that the Commission, by adopting wire center tests for both high-capacity transport and loops, failed to account for differences in the economics of deploying loops and transport. CLEC Br. 16. To the contrary, the Commission's tests properly account for those differences. Because "the costs of deploying loops can vary tremendously depending on the length of the lateral that a competitor must construct between the fiber ring's splice point and the building," the Commission specifically designed its loop impairment test to capture "areas characterized by high revenue opportunities *and* the likely presence of multiple competitive fiber rings." *Order* ¶ 168 (JA) (emphasis added). That is why the agency's "test for high-capacity loops requires both a minimum number of business lines served by a wire center *and* the presence of a minimum number of fiber-based collocators to show that requesting carriers are not impaired." *Ibid.* (emphasis in original). By contrast, the test for high-capacity transport can be satisfied "by either a sufficient number of lines *or* a sufficient number of collocations." *Ibid.* (emphasis in original). The Commission's different tests for loops and transport reasonably reflect the different economic conditions affecting the deployment of those facilities.

3. Next, the CLECs claim that "there is no basis to predict, based solely on business line and fiber collocation proxies, that high capacity loops are or can be competitively deployed." CLEC Br. 18. This Court has held, in affirming the Commission's use of a similar test, that "collocation can reasonably serve as a measure of competition in a given market," particularly when, as here, it is "superior to the various alternatives proposed by petitioners." *WorldCom*, 238 F.3d at 459. The CLECs "offer no alternative save a painstaking analysis of market conditions." *Ibid.* The Commission acknowledged that the results of its wire center test "may in some cases be under-inclusive (denying unbundling in specific buildings where competitive entry is not in fact economic) or over-inclusive (requiring unbundling in specific buildings where competitive entry is in fact economic)." *Order* ¶ 155 (JA). Nonetheless, the Commission found that a wire center test was the best of an imperfect set of alternatives. *Ibid.* "That the FCC chose to rely upon an admittedly imperfect measure of competition does not render its use arbitrary and capricious." *WorldCom*, 238 F.3d at 459. Indeed, the Court in *USTA II* recognized "the inevitability of *some* over- and under-inclusiveness in the Commission's unbundling rules." *USTA II*, 359 F.3d at 570 (emphasis in original).

4. The CLECs' argument that the ILECs submitted business line counts that do not meet the definition of business lines adopted by the Commission (Br. 20) is not properly before the Court. The Commission's test requires ILECs to count business lines on a voice grade equivalent basis. In other words, a DS1 loop counts as 24 business lines, not one. *See* 47 C.F.R. § 51.5 (definition of "business line"). Two weeks after the Commission issued the *Order*, SBC and BellSouth submitted letters to the Commission indicating that the business line counts they adduced before the Commission ruled failed to count UNE business lines in that manner.[31] Some CLECs subsequently raised this issue in a petition for reconsideration, which is pending before the Commission.[32] Because the CLECs' argument in this case "relies on questions of fact

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[31] *See* Letter from James Smith, SBC, to Jeffrey Carlisle, FCC, Feb. 18, 2005, at 1 n.2 (JA); Letter from Bennett Ross, BellSouth, to Jeffrey Carlisle, FCC, Feb. 18, 2005, at 1 (JA).

[32] *See* Petition for Reconsideration filed by Eschelon Telecom, Inc., *et al.*, WC Docket No. 04-313, at 11-15 (March 28, 2005).

… upon which the Commission … has been afforded no opportunity to pass," this issue is not properly before the Court. 47 U.S.C. § 405(a). Under section 405, courts "generally lack jurisdiction to review arguments that have not first been presented to the Commission." *BDPCS, Inc. v. FCC,* 351 F.3d 1177, 1182 (D.C. Cir. 2003); *see also AT&T Wireless Services, Inc. v. FCC,* 365 F.3d 1095, 1101-03 (D.C. Cir. 2004); *AT&T Corp. v. FCC,* 317 F.3d 227, 235-36 (D.C. Cir. 2003). After the Commission rules on the petition for reconsideration, the CLECs may seek review of the Commission's ruling.

5. The CLECs argue (Br. 21) that the wire center test "relies on a carrier holding a particular set of assets, *viz.* a fiber transmission network from which it can deploy very high capacity loops to nearby buildings." They contend that this is inconsistent with the Commission's decision to assess impairment on the basis of the circumstances facing a hypothetical "reasonably efficient competitor." CLEC Br. 20-21. On the contrary, the Commission's test does not make any assumptions about a particular competitor's assets. *See Order* ¶ 26 (JA). Rather, the Commission infers from evidence of actual competitive fiber deployment and a high concentration of business lines that a reasonably efficient carrier could enter that market. The Commission found that, in wire centers meeting the adopted thresholds, competitors "have the ability to deploy their own facilities or obtain access to other competitively deployed networks on a wholesale basis." *Order* ¶ 161 (JA). Thus, the fact that a given carrier may not have a fiber ring in a wire center is not relevant to the Commission's analysis.

6. The CLECs object to the Commission's finding that competitive carriers can serve DS1 customers via channelization of higher-capacity loops connected to a building, claiming that wholesale fiber is rarely available. CLEC Br. 22. This argument erroneously focuses on the characteristics of specific competitors – those that do not have their own transport networks – rather than on the hypothetical reasonably efficient competitor. The Commission fairly inferred from the presence of a high number of business lines and fiber-based collocation within a wire center that it is economic for a reasonably efficient competitor to deploy DS3 or higher-capacity loops in that wire center. *Order* ¶ 178 (JA). The Commission did not draw this inference in a vacuum. It specifically found that "carriers are able to self-deploy competitive DS3 loop facilities in large metropolitan areas where buildings are either directly connected to a competitive fiber ring, or likely would require the construction of only a short lateral from a nearby splice point." *Order* ¶ 154 (JA). The Commission further found that "the incremental costs of providing channelized capacity over … higher-capacity fiber loops are minimal when one or more other customers in a building are already served by competitive fiber of sufficient capacity, or the likelihood of capturing customers at higher capacity justifies deployment of facilities that can be channelized to the DS1 level." *Ibid.* Not only is this reasonable; it is responsive to this Court's mandate in *USTA II*, 359 F.3d at 575. While it may not be economic for a particular carrier to deploy a DS3 or higher-capacity loop to a building, that does not mean that it is uneconomic for a reasonably efficient carrier to do so.

The CLECs' argument also ignores the potential development of a wholesale market. The Commission made a predictive judgment that, in buildings with sufficient revenue opportunities, several competitors will deploy high-capacity fiber capable of being channelized into DS1 loops, and "will offer use of these facilities … on a wholesale basis." *Order* ¶ 173 (JA). The Commission's predictive judgments concerning matters within its expertise are entitled to "particularly deferential" review. *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999); *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1222 (D.C. Cir. 1999);

Melcher, 134 F.3d at 1151. An agency's reasonable "prediction about the market it regulates … deserves [judicial] deference notwithstanding that there might also be another reasonable view." *WorldCom*, 238 F.3d at 459 (quoting *Environmental Action, Inc. v. FERC*, 939 F.2d 1057, 1064 (D.C. Cir. 1991)).

7. Finally, the CLECs contend that they have few high-capacity loops connected to buildings. CLEC Br. 22-23. They do not, however, correlate their loop deployment to the wire centers in which the Commission eliminated unbundling, so that evidence proves nothing about impairment within those wire centers. Moreover, the CLECs' argument again focuses solely on actual deployment, ignoring potential deployment of additional loops. The Commission properly took that into account. *See Order* ¶ 180 (JA).

The CLECs' arguments concerning DS1 loops add up to a policy disagreement with the Commission's test for measuring impairment. Because the Commission "has offered a reasoned explanation for its choice between competing approaches supported by the record," the Court "is not free to substitute its judgment for that of the agency." *APSCO*, 76 F.3d at 398.

(3) The Commission Reasonably Eliminated Unbundling Of DS1 Transport Between Two Tier 1 Wire Centers.

The CLECs claim that the Commission erred by eliminating unbundling of DS1 transport on routes connecting Tier 1 wire centers. CLEC Br. 26-27. They contend that because wholesale alternatives to ILEC facilities exist on only a few routes, the Commission should have found nationwide impairment. CLEC Br. 6.

This argument ignores two fundamental principles that the Court announced in the *USTA* decisions. In *USTA I*, the Court criticized the Commission's decision "to adopt a uniform national rule, mandating [an] element's unbundling in every geographic market." *USTA I*, 290

F.3d at 422. In *USTA II*, the Court held that, in addition to considering the level of actual competitive deployment in a market, the Commission must also draw inferences concerning the prospects for competitive entry in similar markets. *USTA II*, 359 F.3d at 575.

The Commission adhered to these principles in the *Order*. It concluded that fiber-based collocation and business line density are both reasonable indicators of the potential for competitive deployment. *See Order* ¶ 93 (JA). The Commission chose a threshold of 38,000 business lines for Tier 1 wire centers because that level of line density "indicates a significant likelihood that multiple transport providers can serve that wire center." *Order* ¶ 114 (JA). The Commission adopted a threshold of four fiber-based collocators for Tier 1 wire centers because it "indicates that significant revenue potential and deployment exist[] in the wire center and that wholesale opportunities are likely to exist or develop. Indeed, this threshold is satisfied in the small number of wire centers where a disproportionately high number of business lines are located." *Order* ¶ 113 (JA). The Commission found that more than two-thirds of wire centers above the business line threshold also have four or more fiber-based collocators. *Ibid.* "[I]f this percentage of wire centers can attract such substantial fiber-based collocation," the Commission believed that it was "possible that competitors can deploy transport facilities to the remainder of the wire centers above this business line threshold." *Ibid.* The Commission eliminated unbundling of DS1 transport between Tier 1 wire centers because it found "that alternative wholesale transport opportunities at the DS1 level are likely to exist or develop between … such offices." *Order* ¶ 127 (JA).

The CLECs respond to these findings by suggesting that wholesale alternatives to ILEC facilities exist on only a few routes. CLEC Br. 26. That ignores the presence of actual facilities-based competition in the form of fiber-based collocation, as well as potential competition that the

Commission concluded is likely to develop in Tier 1 wire centers. While the CLECs may disagree with the lines the Commission drew, they have not met their burden of showing that those lines are patently unreasonable. *See NASUCA*, 372 F.3d at 461. The relevant question in this case is whether the lines the Commission drew are within a zone of reasonableness, "not whether its numbers are precisely right." *WorldCom*, 238 F.3d at 462 (quoting *Hercules, Inc. v. EPA*, 598 F.2d 91, 107-08 (D.C. Cir. 1978)).

The CLECs also assert (Br. 27) that the Commission ignored arguments concerning operational impediments they may face if they are no longer able to obtain unbundled DS1 transport as part of a combination of loop and transport UNEs known as an enhanced extended link ("EEL"). In the *Order*, the Commission specifically rejected CLEC proposals "to analyze interoffice transport separately" when it is used as part of an EEL. *Order* ¶ 85 (JA). The Commission found that the CLEC proposals would "deem EELs to be a separate network element, an idea the Commission rejected in the *Triennial Review Order*." *Ibid.* (JA -). The Commission concluded that the CLECs had not explained why they should continue to have access to unbundled DS1 transport as part of an EEL "if an efficient competitor could duplicate the transport facility on that route." *Ibid.* (JA). The CLECs do not address the Commission's findings in their brief.

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Ultimately, given the inevitable imprecision of *any* method for assessing impairment, the Court should uphold the FCC's tests for gauging impairment with respect to high-capacity facilities. The lines that the agency drew in crafting those tests reflect reasonable policy judgments that are entitled to deference.

V. THE NJDRA'S CLAIMS CONCERNING PREEMPTION AND FORBEARANCE ARE NOT PROPERLY BEFORE THIS COURT.

The NJDRA argues that the FCC's *Order* improperly preempted state commissions. NJDRA Br. 13-16. The NJDRA also challenges the constitutionality of section 10 of the Communications Act, 47 U.S.C. § 160, which requires the Commission to forbear from enforcing statutory requirements or FCC regulations if certain conditions are met. NJDRA Br. 16-25. Neither of these claims is properly before this Court. The Commission in this case neither preempted any particular state action nor applied the forbearance statute. Therefore, the *Order* does not constitute a final, reviewable decision concerning preemption or forbearance. *See AT&T Corp. v. FCC,* 369 F.3d 554, 561-62 (D.C. Cir. 2004) (a public notice issued by the FCC was not reviewable because it did not decide the issues raised by the petition for review).

In any event, the NJDRA's preemption and forbearance claims are not ripe for review. Its preemption argument closely resembles claims that some state commissions asserted in *USTA II*. The states in that case contended that the *Triennial Review Order* improperly preempted state unbundling rules that differed from the FCC's rules. In that order, however, the FCC did not actually preempt any particular state regulation. It simply predicted that if a state required unbundling of an element that the FCC declined to unbundle, the Commission was "unlikely" to find that the state's requirement was consistent with the Act. *Triennial Review Order* ¶ 195. Because this "general prediction" did "not constitute final agency action," the Court ruled that the states' preemption challenge was unripe. *USTA II,* 359 F.3d at 594.

The preemption issue has not grown any riper since *USTA II.* Indeed, as the NJDRA acknowledges (Br. 15), the FCC did not even address the subject of preemption in the *Order*. Furthermore, the NJDRA, like the states in *USTA II,* has not identified "any substantial hardship" that it would suffer if judicial review of its preemption claims were deferred "until the FCC actually issues a ruling that a specific state unbundling requirement is preempted." *USTA II*, 359 F.3d at 594. The Court should dismiss the NJDRA's preemption claim as unripe.

The Court should accord the same treatment to the NJDRA's constitutional challenge to the forbearance statute. The FCC did not apply that statute in this proceeding. Consequently, there was no need for the agency – and there is no reason for this Court – to address the NJDRA's assertion that the statute is unconstitutional. It is well settled that courts must not "pass upon a constitutional question" if they can dispose of a case on "some other ground." *Syracuse Peace Council v. FCC*, 867 F.2d 654, 657 (D.C. Cir. 1989) (quoting *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)), *cert. denied*, 493 U.S. 1019 (1990). In this case, the Court should not reach the merits of the NJDRA's constitutional arguments because those claims are plainly unripe. *Cf. People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416 (D.C. Cir. 2005) (declining to address a First Amendment claim because it appeared that the claim had become moot).

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

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September 9, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COVAD COMMUNICATIONS COMPANY, ET AL., PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)	NO. 05-1095 (AND CONSOLIDATED CASES)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 25345 words.

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